NAVAL WAR COLLEGE

INTERNATIONAL LAW SITUATIONS

WITH

SOLUTIONS AND NOTES

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PREFACE

The discussions upon international law were, as in recent years, conducted under the auspices of the Naval War College authorities by George Grafton Wilson, LL. D., professor of international law in Harvard University, who also drew up the notes which are published in the present volume. The discussion aimed to consider the situations from the point of view of the belligerent on the offensive, the belligerent on the defensive, and the neutral.

Criticisms of the material presented and suggestions as to topics and situations that should be discussed will be welcomed by the Naval War College.

J. R. Poinsett Pringle,
Rear Admiral, United States Navy,
President Naval War College.

April 1, 1929.

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INTERNATIONAL LAW SITUATIONS WITH SOLUTIONS AND NOTES

Situation I

MARITIME JURISDICTION

States X and Y are at war. Other States are neutral. An act of Congress of the United States, February 19, 1895, provided for the delimitation of the high seas from rivers, harbors, and inland waters. Lines were later drawn on maps published in accordance with this authorization. Some of these lines were 10 miles off the coast.

(*a*) (1) The *Lark*, a vessel of war of X, passes within these outer lines and when 8 miles off the coast summons merchant vessels of the United States and of other States to stop for visit and search. The master of each of these vessels appeals for protection to the authorities of the United States on the ground that the vessels are within the lines drawn under the act of 1895.

(2) The *Thrush*, a vessel of war of Y, attacks the *Cygnet*, a vessel of war of X, on the following day at the same location, and the commander of the *Cygnet* protests on the ground that his vessel is in neutral waters.

(*b*) The *Cygnet* by gunfire drives the *Thrush* 12 miles off the coast. The *Thrush* continues the battle using dangerous gas. Some of this gas floats within 3 miles of the United States and life there is endangered.

(*c*) Later the *Thrush*, still having a large amount of dangerous gas on board, is about to enter a harbor of the United States. The port authorities decline to permit entrance with the gas on board. The commander of the *Thrush* protests, as he is short of fuel to continue his voyage to a home port.

What action should the authorities of the United States take in each case?

SOLUTION

(*a*) (1) The right of visit and search beyond the 3-mile limit upon the high sea is an undeniable belligerent right and the authorities of the United States can afford no protection against its lawful exercise.

(2) The protest of the *Cygnet* is not valid, as these waters are not, for the purposes of neutrality, within the jurisdiction of the United States.

(*b*) The authorities of the United States may use the means at their disposal to prevent the diffusion of dangerous gas within 3 miles of the coast.

(*c*) The authorities of the United States may exclude from its harbors vessels having dangerous gas on board, or may prescribe the conditions of entrance thereto for such vessels.

NOTES

Historical.—The development of a clearly defined law of maritime jurisdiction has been slow. As the desire to control a utility or a presumed utility would ordinarily underlie the exercise of jurisdiction, the attitude toward maritime jurisdiction would vary with the use of the sea. It might be possible that there would be no conflict of jurisdiction between States when one State used the sea merely as a source of food supply while another regarded it as an effective barrier against hostile invasion. The attitude of States toward jurisdiction, or the exercise of State authority over the sea has rested upon different bases. Sometimes the main reasons for the exercise of authority have been for self-defense, sometimes for economic or other reasons.

In the account of creation in the first chapter of Genesis, God is represented as saying, "Let us make man in our image after our likeness; and let him have domin-

ion over the fish of the sea." This seems to be a general injunction to the effect that fish are to be for man. The problem as to the limits of rights in fish when different men or groups of men claim the fish still remains unsettled. Man has been given dominion on the earth; he has shown himself able to exercise dominion, and there has been disagreement as to the exercise of this dominion. The water area of the earth from its very nature is less subject to permanent control than the land area. The advantages of permanent control would not ordinarily be equal to the effort. In early times this was particularly true of the sea, which was unknown and feared.

From the works of ancient writers it is evident that the sea was often regarded as susceptible of possession in the same manner as land. There were also early declarations, as among Roman jurists, that "the use of the sea is as free to all men as the air." Et quidem naturali jure communia sunt omnium haec: aer et aqua profluens et mare et per hoc litora maris. (Inst. 2, I, 1.)

The claims of the Phœnicians, the Persians, the Greeks, the Macedonians, and others over the Eastern Mediterranean Sea gave rise to many struggles as did the claims of Carthage and Rome to the mid-Mediterranean. Other rivalries for control of the Mediterranean followed to which the Crusades added importance.

The idea of maritime sovereignty came to be the prevailing one, however, during the Middle Ages. The prevalence of lawlessness at sea in the form of piracy and otherwise during the Middle Ages required a strong hand to suppress. It was natural that a state should protect its neighboring trade routes, and its own traders, as well as foreign traders who also would gladly yield obedience in return for this protection. The commerce of the Italian state was, during this period, very important. The marriage of the sea celebrated by the city of Venice from the latter part of the twelfth century was emblematic of the authority which that city had at the time over the Adriatic. Venice from time to time

claimed and exercised the privilege of excluding others from the use of the Adriatic. The restrictive measures were usually taken with a view to protecting trade and commerce in these early days.

The Italian writers even before Bartolus maintained that cities like Venice and Genoa having ports had jurisdiction and sovereignty in the neighboring sea to 100 miles and even farther if it was not near another State.

With the traversing of the great seas by voyages of discovery and commerce and the opening of the Western Hemisphere new problems arose. The Portuguese had cruised along the coast of Africa and to India. Spain was also striving for maritime power and Columbus discovered America under Spanish patronage. The papal bull of Alexander VI in 1493 confirmed to Ferdinand and Isabella all lands found or to be found west of a meridian 100 leagues west of the Azores. Spanish maritime power was unable to maintain exclusive control of the seas. The English, Dutch, and French sought control of the sea.

Even as early as the twelfth century the Black Book of the Admiralty (1.58) refers to the sea belonging to the King of England—" la mer appartenant au roi d'Angleterre." Other States also claimed extended maritime jurisdiction and it was inevitable that with the growth of maritime commerce and the use of the sea conflicts would arise.

The documents of the late Middle Ages show many conflicting claims to maritime jurisdiction. Not merely were there conflicting claims but often the attempt to maintain the claims resulted in the use of force and varied reprisals. Occasionally treaties were made in regard to the use of the sea, but till modern times treaties and practice showed little tendency toward the recognition of fundamental principles of maritime jurisdiction.

Rulers in their titles and proclamations sometimes asserted dominion which was never exercised. Power was

often exercised arbitrarily because there were no accepted bounds of authority. After the Middle Age period appeal to precedent and custom in support of State acts became more common. Claims and counter claims fill many pages of royal proclamations and decrees, and of argumentative treatises. It was not till the seventeenth century that the questions of maritime jurisdiction in the modern sense became especially prominent. The titles, king of the sea, lord of the ocean, successor to Neptune, had been used by different rulers and in varying sense throughout many centuries and medals had been struck proclaiming these titles.

Hugo Grotius had prepared in 1604–5 a treatise De Jure Praedae which was in the nature of a brief for the Dutch East India Co. This remained unknown till 1864 and was published in 1868. Chapter XII of this brief appeared anonymously in 1608 as Mare Liberum. It defends the rights of the Dutch as against the Portuguese pretentions particularly in the East Indian waters. Grotius endeavors by reference to the writers of Greece and Rome, to the Holy Scriptures and other sources to maintain that no nation could have exclusive jurisdiction over the sea and its navigation and trade.

Gentilis seems to have been unduly hopeful when writing in the early seventeenth century he expressed himself in Hispanicae Advocationis, 1613, Book I, Chapter VIII, De marino territorio tuendo, saying "Fruantur Hollandi, fruantur mari omnes, sed citra injuriam alienae jurisdictionis. Sed et meminerint omnes, esse et modum marini, atque omnis itineris. Meminerint, alia olim indistincta, quae distincta sunt hodie, et cautissime servandam distinctionem juris gentium dominiorum atque jurisdictionum." "Let the Dutch enjoy, let all enjoy the use of the sea, but without violation of another's jurisdiction. On the other hand also let all remember there is likewise a limit to marine as well as to other journeying. Let them remember that other things once unsettled are now

settled and that the demarcation as to dominion and jurisdiction of the law of nations should be most carefully observed." In this chapter Gentilis also affirms territory consists both of land and water: "At ego, quod olim scripsi in libris bellicis, territorium et de terris dici, et de aquis." In the discussion following this statement Gentilis makes the distinction between territory and jurisdiction and shows that it has been recognized.

Grotius sums up the best opinion of the early days of the seventeenth century, though not following Gentilis, saying:

> It would seem that dominion over a part of the sea is acquired in the same manner as other dominion; that is, as said above, because it appertains to a person or to a territory—as appertaining to a person when he has a fleet, which is a sea army, in that part of the sea; as appertaining to territory in so far as those who sail in the adjacent part of the sea can be commanded from the shore no less than if they were upon land. (De Jure Belli ac Pacis. Lib. II., c. 3, 13.)

The Mare Liberum of Grotius did not attract immediate attention. Séraphin de Freitas made a clever reply in behalf of the Spanish, which was published in 1625.

The Mare Clausum seu de Dominio Maris by John Selden published in 1635 particularly called attention to the Mare Liberum of Grotius and joined issue with the positions taken by Grotius. Selden endeavors with many supporting references to prove that the sea may be subjected to the private dominion or ownership as well as the land and that the sea about Great Britain has always belonged to Great Britain.

Other pamphlets and books on either side of the question appeared. Graswinckel, in an ostensible reply to Burgus, who in 1641 had defended Genoa's claim to dominion of the Ligurian Sea, attacked Selden. Graswinckel also replied to Welwod. The works of Boroughs, Loccenius, Burman, von der Reck, Schook, Boxhorn, and others as well as a translation of Selden's Mare Clausum were published about the middle of the

seventeenth century. Every possible source was cited in support of opposing points of view. Many of these books were vitriolic in their references to those whose views were not in accord with their own. Discussion of maritime jurisdiction reached its maximum in the seventeenth century and continued active through the first half of the eighteenth century. More and more with the recognition of the principle of equality of states and the development of the idea that the sea was res nullius there was need of definition of maritime rights.

From the latter part of the seventeenth century the Roman law, the commentaries, and the classical writers of Greece and Rome were less the bases upon which writers rested their arguments. Texts upon the laws of war, on the laws of nations and of nature, reference to practice and detailed treatment of special topics multiplied and had to be considered. The early idea of property in the sea was that of complete dominion, involving the right to use, to enjoy, or to alienate to the exclusion of others, usus, fructus, abusus. This is what Plutarch considers Pompey to have attained in 67 B. C., calling it "not a sea-command but an out-and-out monarchy and irresponsible power over all men. For law gave him dominion over the sea this side of the pillars of Hercules." (Plutarch, Pompey XXVI.) The Middle Age period generally reaffirmed earlier ideas. The revolutionary ideas as to the laws of the seas came in the seventeenth century, though germs of these ideas can be found in earlier periods.

Codes of sea law for merchants had of necessity grown up, otherwise commerce would have been impossible. These codes were not always in accord with local law but were observed for mutual advantage. As the Law of Rhodes served merchants in early times so such codes as the Consolato del Mare served the later ages.

It came to be realized that limits must be set to the exercise of authority of one state if other states bordered

upon the same sea. Some admitted that any state, whether large or small, weak or strong, was entitled to some authority over the marginal sea which touched its coasts. Accordingly if two states were upon opposite sides of a sea, as Great Britain and Holland on the opposite sides of the North Sea, there must be a line limiting the extent of the authority of each state. Even Selden, referring to the Atlantic and Arctic Oceans, admits of that area, "it can not all be called British seas"; yet "the nation of Great Britain has very large rights and privileges of their own in both seas" (Mare Clausum, Bk. 1. c. 2). Cicero had held that the main body of the sea should be common to all. This was admitted by some of the ardent advocates of the mare clausum, while certain supporters of mare liberum claimed the open sea extended to the shore. Gradually, with the development and recognition of mutual rights and obligations, extreme nationalistic claims were found to be of little advantage or to be of positive disadvantage. Grotius in 1625 had spoken of jurisdiction of the sea as "ratione territorii, quatenus ex terra cogi possunt, qui in promixa maris parte versantur, nec minus quam si in ipsa terra reperirentur" (De Jure Belli ac Pacis, Lib. II. c. 3.13).

Bynkershoek at the beginning of the eighteenth century in his De Dominio Maris proposed a formula not unlike earlier ideas but brief, which appealed to man's sense of appropriateness. He declared "potestatem terræ, finiri, ubi finitur armorium vis." (cap. 2.) "Pronunciamus mare liberum, quod non possidetur vel universum possideri nequit, clausam, quod post justam occupationem navi una pluribusque olim possessum fuit." (cap. 7.) This principle set forth by Bynkershoek in 1702 was not a new principle. Nearly one hundred years before the Dutch representative arguing against the proclamation issued by James I in 1610 in regard to fishing off the English coast had maintained "2. For that it is by the laws of nations, no prince can challenge fur-

ther into the sea than he can command with a cannon except gulfs within their land from one point to another. 3. For that the boundless and rolling seas are as common to all people as the air which no prince can prohibit."

The treatise of Bynkershoek marks a transition from the abstract discussion of the extent of authority of an adjacent state over the sea to a concrete basis for the authority, namely the ability to exercise the authority. Earlier writers had found divine law, natural law, dicta of the classics and of Roman law, practice of certain states, the claims of rulers, bases for their positions; Bynkershoek reduced his formula to the simple basis of effectivity. The early writers had approved in some cases unlimited control, necessity (Molloy), the horizon (Valin), 100 miles (Bartolus), 60 miles (Bodin), 2 days journey (Loccenius), etc. Bynkershoek's proposition to limit jurisdiction by the range of cannon from the shore was therefore welcomed. The range of cannon in the early eighteenth century being about 3 miles, the marine league became a commonly accepted limit of maritime jurisdiction.

Early in the eighteenth century the claims of control of the Indian seas, the routes to America and other wide ocean areas were for the most part discontinued, but just how far a state had jurisdiction from its coast was not settled even though Bynkershoek's formula was so well received.

Other theories had from early times been put forward for control over the sea. The needs of the adjacent State were put forward by Sarpi in support of the claims of Venice. Scandinavian claims to extended control were supported by the argument that the nature of their mainland and their dependence upon the sea required control of a large maritime area. The configuration of the coast had been put forward as a basis for authority over the sea. Long exercise of control was referred to as evidence that control should be continued.

Treaties, judgments of courts, etc., were put forward to maintain claims.

During many years there had been growing up a tendency to differentiate in the exercise of jurisdiction according to the nature of the end to be secured. Claims to extended jurisdiction to satisfy national and royal vanity were, however, often merely empty words.

While the Roman law showed uniformity in principles relating to dominion of water areas, later legislation showed great diversities. National ideas, ambitions, and exigencies were reflected in laws. While Roman law phraseology was sometimes retained, the meaning of the words was not uniform. Claims were sometimes more or less extended according to the power of the ruler of the adjacent territory to enforce his claims. Sometimes a ruler would fight for abstract claims but usually they had to find an ostensible support in some national advantage such as security from attack.

Some of the extreme claims were first waived by allowing navigation or simple passage of vessels along the coast waters within the area claimed by the State. Salutes by lowering of flag or of sails by foreign vessels were sometimes required even when navigation was otherwise free. It was one of the early claims that the passage of a vessel over the sea leaving only the wake which soon disappeared was not to be denied by the adjacent State because it in no way injured the adjacent State. The wind that filled the sails of the passing ship did not take away from the breeze that touched the shore.

There might, however, be just claim to fisheries along the coast or to the salt, minerals, and other deposits upon the sea bottom adjacent to a State. The fishery rights in marginal waters were among the earliest to be asserted and maintained. When fish constituted an important part of the food supply of Europe, particularly during the Middle Ages, fishing rights were the bases of many controversies and the transportation of fish gave rise to other controversies. Records of the thirteenth century

show attempts of States to control fisheries along their coasts. Long before the questions of jurisdiction were of importance, fisheries were the subject of control.

There were many pamphlets put forth during the seventeenth and eighteenth centuries supporting or denouncing rights at sea and particularly fishing rights. The rulers had by laws and decrees, particularly during the seventeenth century, regulated fishing and trade in fish. There had been many earlier decrees upon the same subject but they were not so detailed as some of the eighteenth century decrees, which even regulated the sale of oysters in the shell. Decrees, ordinances, etc., prescribed for licenses, permits, registration, place of fishing, nationality of crew, days of fishing, Sundays and fast days, and a French Arrêt du Conseil d'État du 20 Mars 1786, Art. VI, provided favors for foreigners who married women of Marseille and also that they "soient reçus membres de la communauté des pêcheurs françois aussitôt après leurdit mariage." These decrees did not, however, prescribe the limits of the marginal seas, but only asserted rights in these seas so far as fishing was concerned.

Though much had been written, and treaties had been made and judgments had been rendered, the questions of jurisdiction were far from completely settled at the beginning of the nineteenth century. Rayneval in the preface to his work De la Liberté des Mers in 1811 said, "L'Ocean seul semble être abandonné aux caprices des nations, à l'instabilité ou à l'exagération de leurs vues, de leurs prétentions et de leur puissance." (P. VII.)

This uncertainty of the law before the nineteenth century was natural owing to the continual opening of new maritime areas by exploration and trade which led to readjustments in ideas as to rights. During the eighteenth century there had been developing also the distinction between belligerent and neutral rights at sea. These rights were somewhat defined by the armed neu-

tralities of 1780 and 1800 and by the American neutrality proclamation of 1793 and the act of Congress of 1794. It came to be held that a state which took no part in a war should not be liable to injury and consequently no act of hostility should take place within range from the shore of guns on the vessels at sea, which was held to be 3 miles.

In all the discussions, opinions, and writings there was little difference of opinion as to the jurisdiction of a state over the shore itself upon which the sea washed. The Roman law granted this even to the lowest tide mark. (Inst. II, 1, 3.) The same principles was introduced in domestic legislation in different states as in the ordinances of France of 1534, 1596, and 1581, "Sera réputé bord et rivage de la mer tout ce qu'elle couvre et découvre pendant les nouvelles et pleines lunes, et jusqu'où le plus grand flot de mers se peut étendre sur les grèves." In some states as in England the area between high and low-water mark was held to be within the jurisdiction of the maritime authorities at high tide and of the land authorities at low tide, but it was rarely denied that the authorities of the adjacent state had jurisdiction to the low-water mark. This ancient principle seemed at the beginning of the nineteenth century about the only one to which there might be said to be adherence.

During the nineteenth century there were many attempts by writers of great ability to set forth principles which would be generally accepted, but the development of commerce and nationalism introduced new problems as had exploration and discovery in earlier periods.

Property on the sea had from earliest times been exposed to danger. The forces of nature had often destroyed such property with the lives of those who accompanied it leaving no trace. The temptation to man to take property on the sea had been too great to be resisted apparently even in periods reaching far back of recorded history. Pirate communities vied with each other and their leaders lived in state. In the days of Pompey

pirates controlled the Mediterranean even to the Columns of Hercules. Pompey in 67 B. C. by the lex Gabinia was given for 3 years unlimited command of the Mediterranean and for 50 miles along its shores. With this authority, and within 3 months, he cleared the Mediterranean of pirates. They returned and later rulers had to repeat the campaigns of Pompey in order that the Romans might call the Mediterranean mare nostrum.

Private citizens were sometimes authorized by a state to make reprisals upon the citizens or property of the citizens of another state. Their acts were often very like those of pirates. Other states demanded tribute at times which tribute differed very little from the exactions of pirates. Privateering in the time of war added another peril to seafaring life. The attitude of states toward these acts varied and the exercise of control over the sea varied correspondingly. The slave trade gave rise to other differences in law and practice among the so-called civilized states. Impressment upon the sea continued through the early days of the nineteenth century. At the beginning of the nineteenth century it would be possible to find precedents or to cite authorities for almost any claim a state might wish to make as to jurisdiction over the sea.

The rapid development of the idea of neutrality in the nineteenth century following the armed neutralities of 1780 and 1800 introduced new problems. These problems were further complicated by the introduction of new means and methods of warfare. Three miles became a very short range for cannon and many wished the range extended.

Eighteenth century treaties.—Almost as soon as there came to be any agreement upon territorial waters, treaties were made. The eighteenth century saw the gradual development of the idea of a marginal sea and the cannon shot was the basis of measurement. This followed the idea of Bynkershoek in 1702 of control as far as cannon shot could reach.

The treaty between France and Russia of January 11, 1787, provided:

ART. 28. In consequence of these principles, the high contracting parties pledge themselves reciprocally, in case one of them makes war against another power, to never attack the vessels of his enemy within cannon range of the coasts of his ally. They pledge themselves also to mutually observe the most perfect neutrality in the harbors, ports, gulfs, and other waters included in the name of inclosed waters, which belong to them, respectively.

The treaty between the United States and Great Britain, November 19, 1794, provided:

ART. 25. * * * Neither of the said parties shall permit the ships or goods belonging to the subjects or citizens of the other, to be taken within cannon shot of the coast, nor in any of the bays, port, or rivers of their territories, by ships of war, or others having commission from any prince, republic, or State whatever. But in case it should so happen, the party whose territorial rights shall thus have been violated, shall use his utmost endeavors to obtain from the offending party full and ample satisfaction for the vessel or vessels so taken, whether the same be vessels of war or merchant vessels.

Austrian ordinance, 1803.—An ordinance respecting the observance of neutrality issued by Austria, August 7, 1803, also provided for the gun range:

ART. 11. As all vessels without exception should enjoy the protection that is derived from neutrality and perfect security in all of the ports, roadsteads, and along the coasts subject to our dominion, hostilities by one or more vessels of powers at war will not be permitted in the said parts or within gun range of the shore, nor, consequently, any combat, pursuit, attack, visit, or seizure of vessels. All our authorities, and particularly the military commanders in seaports, must use especial vigilance to this end.

Kent's opinion.—Chancellor Kent was inclined in the early nineteenth century to take a very liberal view of American rights in adjacent waters. He regarded the principles applied in England, of including the waters between headlands as King's Chambers, as also applicable to the American coast.

Considering the great extent of the line of the American coasts, we have a right to claim, for fiscal and defensive regulations, a liberal extension of maritime jurisdiction; and it would not be unreasonable, as I apprehend, to assume, for domestic purposes connected with our safety and welfare, the control of the waters on our coasts, though included within lines stretching from quite distant headlands, as, for instance, from Cape Ann to Cape Cod, and from Nantucket to Montauk Point, and from that point to the capes of the Delaware, and from the south cape of Florida to the Mississippi. It is certain that our Government would be disposed to view with some uneasiness and sensibility, in the case of war between other maritime powers, the use of the waters of our coasts, far beyond the reach of cannon shot, as cruising ground for belligerent purposes. * * * It ought, at least, to be insisted that the extent of the neutral immunity should correspond with the claims maintained by Great Britain around her own territory, and that no belligerent right should be exercised within "the chambers formed by headlands, or anywhere at sea within the distance of 4 leagues, or from a right line from one headland to another." (Commentaries on American Law, 14th ed., p. 26.)

"*Alabama*" *and* "*Kearsarge*."—In 1864 the problem of an engagement between two vessels of considerable gun range arose in consequence of the arrival of the Confederate steamer *Alabama* at Cherbourg. On June 13, 1864, Mr. Dayton, minister to France, informed Secretary Seward that he had immediately telegraphed to Captain Winslow of the United States ship *Kearsarge* at Flushing and received reply that Captain Winslow "will be off Cherbourg about Wednesday." Mr. Dayton also protested against the sojourn of the *Alabama* as an unneutral use of French ports and to Mr. Seward sent the following information:

You will, doubtless, have received, before this, notice of the arrival of the *Alabama* in the port of Cherbourg, and my protest to this Government against the extension of any accommodations to this vessel. M. Drouyn de l'Huys yesterday informed me that they had made up their minds to this course, and he gave me a copy of the written directions, given by the minister of marine to the vice admiral, maritime prefect at Cherbourg, a translation of which accompanies this dispatch. But he, at the same time, in-

formed me that the United States ship of war, the *Kearsarge*, had appeared off the port of Cherbourg, and there was danger of an immediate fight between those vessels. That the *Alabama* professes its entire readiness to meet the *Kearsarge*, and he believed that each would attack the other as soon as they were 3 miles off the coast. That a sea fight would thus be got up in the face of France and at a distance from their coast within reach of the guns used on shipboard in these days. That the distance to which the neutral right of an adjoining Government extended itself from the coast was unsettled, and that the reason of the old rules, which assumed that 3 miles was the outermost reach of a cannon shot, no longer existed, and that, in a word, a fight on or about such a distance from their coast would be offensive to the dignity of France, and they would not permit it. I told him that no other rule than the 3-mile rule was known or recognized as a principle of international law; but if a fight were to take place, and we would lose nothing and risk nothing by its being further off, I had, of course, no objection. I had no wish to wound the susceptibilities of France by getting up a fight within a distance which made the cannon shot liable to fall on her coast. I asked him if he would put his views and wishes on this question in writing, and he promised me to do so. I wrote to Captain Winslow this morning, and herewith inclose you a copy of my letter. I have carefully avoided in this communication anything which would tend to make the *Kearsarge* risk anything by yielding what seemed to me an admitted right. (Diplomatic Correspondence, U. S. 1864, vol. 3, p. 104.)

The instructions to the maritime prefect at Cherbourg mentioned in Mr. Dayton's dispatch were translated as follows:

We can not permit the *Alabama* to enter into one of our basins of the arsenal, that not being indispensable to place it in a state to go again to sea. This vessel can address itself to commerce (commercial accommodations), for the urgent repairs it has need of to enable it to go out; but the principles of neutrality, recalled in my circular of the 5th of February, do not permit us to give to one of the belligerents the means to augment its forces, and in some sort to rebuild itself: In fine, it is not proper that one of the belligerents take, without ceasing, our ports, and especially our arsenals, as a base of their operations, and, so to say, as one of their own proper ports.

You will observe to the captain of the *Alabama* that he has not been forced to enter into Cherbourg by any accidents of the sea,

and that he could altogether as well have touched at the ports of Spain or Portugal, of England, of Belgium, and of Holland.

As to the prisoners made by the *Alabama*, and who have been placed ashore, they are free from the time they have touched our soil; but they ought not to be delivered up to the *Kearsarge*, which is a Federal ship of war. This would be for the *Kearsarge* an augmentation of military force, and we can no more permit this for one of the belligerents than for the other. (Ibid. p. 105.)

To Captain Winslow in the letter mentioned in his dispatch Mr. Dayton said:

This will be delivered to you by my son and assistant secretary of legation. I have had a conversation this afternoon with Mr. Drouyn de l'Huys, Minister of Foreign Affairs. He says they have given the *Alabama* notice that she must leave Cherbourg; but in the mean time you have come in and are watching the *Alabama*, and that this vessel is anxious to meet you, and he supposes you will attack her as soon as she gets 3 miles off the coast. That this will produce a fight which will be at best a fight in waters which may or may not be French waters, as accident may determine. That it would be offensive to the dignity of France to have a fight under such circumstances, and France will not permit it. That the *Alabama* shall not attack you, nor you her, within the 3 miles, or on or about that distance off. Under such circumstances I do not suppose that they would have, on principles of international law, the least right to interfere with you if 3 miles off the coast; but if you lose nothing by fighting 6 or 7 miles off the coast instead of 3, you had best do so. You know better than I do (who have little or no knowledge of the relative strength of the two vessels) whether the pretence of the *Alabama* of a readiness to meet you is more than a pretence, and I do not wish you to sacrifice any advantage if you have it. I suggest only that you avoid all unnecessary trouble with France; but if the *Alabama* can be taken without violating any rules of international law, and may be lost if such a principle is yielded, you know what the Government would expect of you. You will, of course, yield no real advantage to which you are entitled, while you are careful to so act as to make, uselessly, no unnecessary complications with the Government. I ought to add that Mr. Seward's dispatch, dated May 20, 1864, was in the following words: "The *Niagara* will proceed with as much dispatch as possible to cruise in European waters, and that the *Dictator*, so soon as she shall be ready for sea (which is expected to be quite soon), will follow her, unless, in the meantime, advices from yourself and Mr.

Adams shall be deemed to furnish reasons for a change of purpose in that respect." That you may understand exactly the condition of things here in regard to the *Alabama*, I send you herewith a copy of a communication from the minister of marine of the naval prefect at Cherbourg, furnished me by the Minister of Foreign Affairs. (Ibid. p. 104.)

Naval War College Discussion, 1913.—In Topic I, 1913, the subject was, "What regulations should be made in regard to the use in time of war of the marginal sea and other waters?" In the discussion of 1913 it was said: "In time of war there is still much difference in the practice of states. (1913 Naval War College, Int. Law Topics, p. 15.) Following this examples of the diversity of practice were given. It was shown that the Institute of International Law had in 1894 and in 1912 proposed 6 miles as the limit of the marginal sea. The Government of the United States in 1896 indicated that it would "not be indisposed to consider the adoption of a 6-mile limit and in 1913 it was said "The present tendency as shown in international conferences is to extend the limits of maritime jurisdiction" and the drift was before 1914 toward a 6-mile limit.

Waters adjacent to the 3-mile limit.—It has long been recognized that for certain purposes a littoral state may exercise jurisdiction beyond the 3-mile limit. In early times claims to such authority were very extended. While exclusive claims over the water area adjacent to the 3-mile limit have been abandoned, there has been a general admission that the needs and safety of the neighboring state may sanction the exercise of certain powers in the high sea adjacent to its marginal sea.

One of the most common grounds of the exercise of jurisdiction outside the marginal sea is for the enforcement of customs regulations and the prevention of smuggling. Laws upon this subject were enacted by nearly all maritime states. The states maintained that if they had the right to regulate commerce within their ports and coasts and to enforce regulations, it was necessary

to exercise authority at considerable distances from the coasts. These laws in regard to the enforcement of customs have gradually become better defined and in some instances have been repealed.

Special legislation for other purposes such as sanitation, safety of life at sea, etc., has been regarded as essential by some states.

Attitude of United States.—In a letter from Mr. Bayard, Secretary of State, to Mr. Manning, Secretary of the Treasury, May 28, 1886, it was stated that for the United States—

> We may, therefore, regard it as settled * * * that so far as concerns the eastern coast of North America, the position of this department has uniformly been that the sovereignty of the shore does not, so far as territorial authority is concerned, extend beyond 3 miles from low-water mark, and that the seaward boundary of this zone of territorial waters follows the coast of the mainland, extending where there are islands so as to place round such islands the same belt. This necessarily excludes the position that the seaward boundary is to be drawn from headland to headland, and makes it follow closely, at a distance of 3 miles, the boundary of the shore of the continent or of adjacent islands belonging to the continental sovereign.
>
> The position I here state, you must remember, was not taken by this department speculatively. It was advanced in periods when the question of peace or war hung on the decision. When, during the three earlier administrations, we were threatened on our coast by Great Britain and France, war being imminent with Great Britain, and for a time actually though not formally engaged in with France, we asserted this line as determining the extent of our territorial waters. When we were involved, in the earlier part of Mr. Jefferson's administration, in difficulties with Spain, we then told Spain that we conceded to her, so far as concerned Cuba, the same limit of territorial waters as we claimed for ourselves, granting nothing more; and this limit was afterwards reasserted by Mr. Seward during the late Civil War, when there was every inducement on our part not only to oblige Spain but to extend, for our own use as a belligerent, territorial privileges. (1 Wharton, Int. Law Digest, p. 107.)

In 1902 in the hearing on the arbitration of whaling and sealing claims at The Hague, Mr. Herbert H. D.

Pierce, Assistant Secretary of State and delegate of the United States, on July 4 said:

> In the first session the arbitrator asked me, "What is the extent of jurisdiction which the United States claim to-day in Bering Sea?" and I replied that the American Government now claims an extent of 3 miles. I wished that this reply might be sustained by the Secretary of State, Mr. John Hay. I am now in receipt of a dispatch, and in accordance with the authority which I have received from the Secretary of State of the United States, dated July 3, 1902, I repeat that the Government of the United States claims, neither in Bering Sea nor in its other bordering waters, an extent of jurisdiction greater than a marine league from its shores, but bases its claims to jurisdiction upon the following principle: The Government of the United States claims and admits the jurisdiction of any State over its Territorial waters only to the extent of a marine league, unless a different rule is fixed by treaty between two States; even then the treaty States alone are affected by the agreement. (1902 Foreign Relations Appendix 1, p. 440.)

Navigation laws of the United States.—As early as 1790 the United States passed laws in regard to the enforcement of its customs regulations. (1 U. S. Stat. 145.) The tariff act of the United States of September 21, 1922, provides for the exercise of authority for customs purposes up to 4 leagues from the coast and other states have similar legislation as in the codes of several of the South American and European states.

The safety of navigation has led to the enactment of many laws under which authority for the purpose specified was to be exercised outside the 3-mile belt. The act of Congress of the United States of February 19, 1895, was of this character.

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That on and after March first, eighteen hundred and ninety-five, the provisions of sections forty-two hundred and thirty-three, forty-four hundred and twelve, and forty-four hundred and thirteen of the Revised Statutes and regulations pursuant thereto shall be followed on the harbors, rivers, and inland waters of the United States.
>
> The provisions of said sections of the Revised Statutes and regulations pursuant thereto are hereby declared special rules

duly made by local authority relative to the navigation of harbors, rivers, and inland waters as provided for in article thirty, of the act of August nineteenth, eighteen hundred and ninety, entitled "An act to adopt regulations for preventing collisions at sea."

SEC. 2. The Secretary of the Treasury is hereby authorized, empowered, and directed from time to time to designate and define by suitable bearings or ranges with lighthouses, light vessels. buoys, or coast objects, the lines dividing the high seas from rivers, harbors, and inland waters.

SEC. 3. Collectors or other chief officers of the customs shall require all sail vessels to be furnished with proper signal lights. Every such vessel that shall be navigated without complying with the Statutes of the United States, or the regulations that may be lawfully made thereunder, shall be liable to a penalty of two hundred dollars, one-half to go to the informer; for which sum the vessel so navigated shall be liable, and may be seized and proceeded against by way of libel in any district court of the United States having jurisdiction of the offense.

SEC. 4. The words "inland waters" used in this act shall not be held to include the Great Lakes and their connecting and tributary waters as far east as Montreal; and this act shall not in any respect modify or affect the provisions of the act entitled "An act to regulate navigation on the Great Lakes and their connecting and tributary waters," approved February eighth, eighteen hundred and ninety-five.

Approved, February 19, 1895. (28 U. S. Stat. p. 672.)

Under the above act lines were established along the coast of the United States at some points more than 8 miles beyond the low-water mark. These lines at times were within the 3-mile limit and usually terminated at designated marks on shore or at buoys, lightships, or lighthouses, thus having little or no relation to the marginal sea as accepted in international law.

Interpretation of act of 1895.—In 1899 a case arose involving the act of February 19, 1895, and raising question of liability in case of an accident in which it was argued that an accident within the limits of a line established under the act of 1895 would be within the jurisdiction of the United States.

In this case through an accident, Carlson was killed by a boat belonging to the respondents and Judge Brown said:

As the maritime law gives no action for death caused by negligence on the high seas (*The Harrisburg*, 119 U. S. 199, 7 Sup. Ct. 140), this action can rest only upon the State statute; and to make that applicable the negligence, or the death, or both, must happen within the jurisdiction of the State. The location of the accident according to the weight of evidence, seems to me clearly more than a marine league, or 3 miles, from any part of the shores of the State of New York or New Jersey; nor is there any manner of drawing lines from headland to headland, except as below stated by which this location could be brought intra fauces terrae. Under the act of Congress, however, approved February 19, 1895 (28 Stat. 672), having reference to the regulations for preventing collisions at sea and authorizing the Secretary of the Treasury to designate and define the lands dividing the high seas from rivers, harbors, and inland waters, the Secretary drew a line extending from Navesink Lighthouse NE. ⅝ E. about 4½ miles to the Scotland light vessel, which is 3 miles from the nearest shore on Sandy Hook, and thence NNE. ½ E. through the Gedney Channel whistling buoy to Rockaway Point Life Saving Station on the Long Island shore. The accident occurred undoubtedly to the westward of that line. Even if this line was a couple of miles beyond the usually recognized limit of 3 miles from a shore, it is contended that the line thus established by the Secretary of the Treasury would be valid as an assertion of the exclusive jurisdiction of the United States as against other nations, because this extension seaward is undoubtedly less than the range of our modern shore batteries (see Pom. Int. Law, §§ 144, 150; Wheat. Int. Law, 177) and any such extension by the United States, it is urged, extends pari passu the jurisdiction and boundaries of the State as its necessary incident. In the case of Bigelow *v.* Nickerson, 17 C. C. A. 1, 70 Fed. 113, however, to which reference on this point is made, the question had reference to the State jurisdiction over the waters of Lake Michigan and was quite different from the present; since there the acts establishing the boundaries of the State expressly included the waters of the lake. In that case, moreover, it was assumed that upon the ocean the State jurisdiction extends but a marine league from shore. (See also Manchester *v.* Massachusetts, 139 U. S. 240, 11 Sup. Ct. 559.) But I doubt whether in fixing the line as above indicated, the Secretary of the Treasury intended to pass beyond the limit of a marine league, the usually accepted boundary. The Scotland lightship does not exceed that distance from shore, and if from that vessel a line be drawn to a point 1 marine league south of the western end of Rockaway Beach, that line will pass through the whistling buoy; so that the

Secretary's line seems to agree accurately with the old rule of jurisdiction, and the accident would be found to be within the State limits. (Carlson *v.* United New York Sandy Hook Pilots Association (1899), 93 Federal Reporter, p. 468.)

The accident was found to be due to the negligence of fellow servants. The libel was dismissed.

So in this case the action was settled on other grounds; but the conclusion is, from the above decision, that the act of February 19, 1895, was not intended to, and did not, change the old rule of jurisdiction extending a marine league off shore.

Russo-Japanese War, 1904.—Cases arising in the Russo-Japanese War, 1904, showed a clear recognition that jurisdiction of the coastal state in time of war is limited to three miles. In the case of the *Rossia*, a Russian merchant vessel, captured February 7, 1904, 6 miles off the coast of Korea, the Sasebo Prize Court said:

> The limit of territorial waters generally recognized by existing international law is 3 nautical miles from the coast. Therefore the capture of this vessel at sea, 6 nautical miles from Kushingham, Corea, was a capture on the high seas, and in no way unlawful. (2 Hurst and Bray, Russian and Japanese Prize Cases, p. 39.)

Similarly in the case of the *Michael*, a Russian deep sea fishing vessel, captured 5½ miles off the coast of Korea, the Sasebo Prize Court said:

> It can not be denied that the *Michael* was an enemy vessel, and that her capture took place after the commencement of hostilities. Further, the place of capture was 5½ nautical miles from the Corean coast, and since the international law regards territorial waters as not extending beyond 3 nautical miles from the shore, the vessel's capture took place on the high seas. (Ibid. p. 80.)

Hague rules on maritime war.—There had been for many years wide differences of opinion concerning rights and duties of neutral powers in maritime war. A convention bearing the title, "Rights and Duties of Neutral Powers in Maritime War" was drawn up at The Hague in 1907 and has been generally accepted. According to its preamble the aim of the Convention, XIII Hague,

was to harmonize the relations which should exist between belligerents and neutrals in time of war. The articles relating particularly to territorial waters were the first three, as follows:

ARTICLE 1

Belligerents are bound to respect the sovereign rights of neutral powers and to abstain, in neutral territory or neutral waters, from all acts which would constitute, on the part of the neutral powers which knowingly permitted them, a nonfulfilment of their neutrality.

ARTICLE 2

All acts of hostility, including capture and the exercise of the right of visit and search, committed by belligerent vessels of war in the territorial waters of a neutral power, constitute a violation of neutrality and are strictly forbidden.

ARTICLE 3

When a ship has been captured in the territorial waters of a neutral power, this power must, if the prize is still within its jurisdiction, employ the means at its disposal to release the prize with its officers and crew, and to intern the prize crew.

If the prize is not within the jurisdiction of the neutral power, the captor government, on the demand of that power, must liberate the prize with its officers and crew.

In the Second Peace Conference at The Hague (the same conference) the following comment was made upon Article I:

"It has sometimes been asked if there is any occasion to distinguish between ports and territorial waters. The distinction is comprehensible as to what concerns the duty of the neutral, who can not be responsible in the same degree for what happens in his territorial waters, over which he often has only a feeble control, as for what takes place in the ports subject to his immediate authority. The distinction is not recognized as to the duty of the belligerent, which is the same everywhere." (Deux. Conf. Int. de la Paix, vol. I, p. 298.)

In ratification by the Senate of the United States, it was stated that this was voted—

"With the understanding that the last clause of article 3 of the said convention implies the duty of a neutral power to make the demand therein mentioned for the return of a ship captured within the neutral jurisdiction and no longer within that jurisdiction." (Proclamation by the President, Feb. 28, 1909.)

Articles 25 and 26 provided—

ART. 25. A neutral power is bound to exercise such surveillance as the means at its disposal allow to prevent any violation of the provisions of the above articles occurring in its ports or roadsteads or in its waters.

ART. 26. The exercise by a neutral power of the rights laid down in the present convention can under no circumstances be considered as an unfriendly act by one or the other belligerent who has accepted the article relating thereto.

Doctor Wehberg's comment.—Doctor Wehberg writing before the World War said of the Hague Convention XIII:

The right of prize can, of course, only be exercised outside neutral waters, as is expressly laid down in article 1 of the "Agreement touching the rights and duties of neutrals in case of naval war." No decision as to which waters are to be regarded as neutral has been arrived at, so that the old international disputes on this point still continue.

While this latter article is only meant as "The expression of the dominating idea of this portion of international law," (Prot. I., p. 297; III., p. 572) article 2 of the agreement gives a special decision as to neutral coasts: "All hostilities committed by warships of belligerents within coastal waters of a neutral power, including seizure and the exercise of the right of search form a breach of neutrality, and are unconditionally forbidden." In case of action in contravention of this, article 3 lays down the following: "If a ship has been captured within the coastal waters of a neutral power, that power must, in so far as the prize is still within its sovereignty employ all the means at its disposal to bring about the release of the prize with her officers and crew, and to hold captive the prize crew placed on board her by the captor. Should the prize be beyond the bounds of its sovereignty, the capturing Government must release the prize, with officers and crew, at the demand of that power." (Wehberg, Capture in War on Land and Sea, p. 62.)

Russia, 1912.—A dispatch from the American ambassador to Russia on February 3, 1912, referring to the laws of the years immediately preceding said:

Russia proposes ultimately to extend her control in every way to a distance of 12 miles from all her coasts bordering on the ocean. This has not yet been fully accomplished, but only in part. The question naturally groups itself into three divisions:

1. The exercise of customs authority to a distance of 12 miles from all her coasts on the open sea.

This law was approved by the Emperor, December 10/23, 1909, promulgated January 1/14, 1910, and is now in force. As yet, so far as can be ascertained, no case calling for special international protest has occurred under it.

2. The extension of Russian jurisdiction over all open-sea fisheries on the Pacific coasts within 12 miles of the lands of the Russian Empire.

This law was passed May 29/June 11, 1911, and went into force December 25/January 7, last.

3. The law extending jurisdiction over fisheries conducted in the White Sea and within 12 miles of the Archangel Government was reported favorably by the committee to the Duma last June, but has not yet been passed. It lies on the table and it is reported that English influence is responsible for the delay in its passage.

England has formally protested against all three of these laws in particular and against the attitude of Russia in general in regard to the extension of jurisdiction from 3 miles to 12. Not being, however, specially interested in the Pacific coast fisheries, England has confined vigorous action to the Archangel and White Sea fisheries, where her interests are large. England hopes to be able to get this proposed law postponed long enough to permit the matter to be presented before the next Hague Conference in 1915. The President of the Duma has assured the British ambassador that the project can not be reached by the present Duma, and M. Sazonov practically admitted the same thing to me.

Japan also has protested in general against the whole proposition of extension of jurisdiction to 12 miles from shore in the open sea, but she has confined her vigorous action to the fisheries in the Pacific, where her direct interests are enormous. The annual Japanese catch of fish in what are now claimed to be Russian waters is valued in gross by the Japanese Embassy at 80,000,000 rubles.

Japan contends that the section of these laws dealing with Pacific fisheries is not only in violation of international law, but is

also a violation of the spirit of the existing Russo-Japanese fishery agreement.

Two Japanese delegates representing the fishing fleet of Japan are now here seeking amelioration of present conditions.

The Japanese Embassy filed a formal note of protest on October 31 last in regard to Russia's action in the Pacific fisheries, but as yet has received no answer.

The item mentioned by you from the American press of December 13 in regard to the abandonment by Russia of this policy is an error.

On the contrary, M. Sazonov in a long interview last night assured me that Russia proposed to maintain the 12-mile limit as a permanent policy, though he hinted that it might be modified in detail, and frankly stated that Russia had agreed to hold conversations with the representatives of Japan and of England, especially on the points in which the two countries were respectively interested.

Russia contends that the 3-mile limit is obsolete. The distance of 3 miles having been set as the conventional range of a cannon, it is claimed that with the extension of the range of modern ordnance the limit of jurisdiction should be increased to correspond. (1912 For. Rel., p. 1304.)

Attitude of Governments, 1914–1918.—The World War made it necessary for many States to pronounce what limits they proposed to fix for their territorial waters as regards belligerent and neutral rights.

In a decree of November 5, 1914, Chile stated—

It is decreed:

The contiguous sea, up to a distance of 3 marine miles counted from the low-water line, is considered as the jurisdictional or neutral sea on the coasts of the Republic for the safeguarding of the rights and the accomplishment of the duties relative to the neutrality declared by the Government in case of international conflicts. (1916 Naval War College, Int. Law Topics, p. 19.)

Subsequently, a decree prescribed that the interior waters of the Straits of Magellan, "Even in the parts which are distant more than 3 miles from either bank should be considered as forming part of the jurisdictional or neutral sea." (Ibid. p. 21.)

The Netherlands, which had brought the matter of a 6-mile limit to the attention of the United States in 1896,

and to which Secretary Olney had replied he would "not be indisposed" to consider such a limit, in its declaration of neutrality of August 5, 1914, stated:

ART. 4. No warships or ships assimilated thereto belonging to any of the belligerents shall have access to the said territory.

* * * * *

ART. 13. It is forbidden, in State territory, to equip, arm, or man vessels intended for military purposes on behalf of a belligerent, or to furnish or deliver such vessels to a belligerent.

ART. 14. It is forbidden, in State territory to supply arms or ammunition to warships or ships assimilated thereto belonging to a belligerent, or to come to their assistance in any manner whatsoever with a view to augment their crew or their equipment.

ART. 15. It is forbidden in State territory failing previous authorization by the competent local authorities, to repair warships or ships assimilated thereto belonging to a belligerent, or to supply them with victuals or fuel.

ART. 16. It is forbidden in State territory to take part in the dismantling or repairing of prizes, except in so far as is necessary to make them seaworthy; also to purchase prizes or confiscated goods and to receive them in exchange, in gift, or on deposit.

ART. 17. The State territory comprises the coastal waters to a distance of 3 nautical miles, reckoning 60 to the degree of latitude, from low-water mark. (Ibid. p. 63.)

Uruguay decreed on August 7, 1914—

ART. 2. In accordance with the principle established by the treaty of Montevideo in 1889 (Penal Law, art. 12), and with the principles generally accepted in these matters, the waters will be considered as territorial waters to a distance of 5 miles from the coast of the mainland and islands, from the visible outlying shoals, and the fixed marks which determine the limit of the banks not visible. (Ibid. p. 107.)

A Swedish decree of July 19, 1916, provided that—

Submarines belonging to foreign powers and equipped for use in warfare may not navigate or lie in Swedish territorial waters within 3 nautical minutes (5,556 meters) from land or from extreme outlying skerries, which are not continuously washed over by the sea, under peril of being attacked by armed force without previous warning. (1917, Naval War College, Int. Law Documents, p. 215.)

Morocco on July 18, 1917, issued regulations fixing 3 miles as the marginal sea limit. (1918 Ibid. p. 116.)

On June 18, 1918, Norway issued new regulations stating—

1. The Norwegian Government, who have in the past claimed that the territorial waters of Norway extend to 4 miles from the shore, have recognized the difficulty of upholding this claim during the war, since it is not recognized by either the British or the German Governments.

2. The Norwegian Government accordingly intimated to His British Majesty's Government, on May 3, 1918, that Norwegian naval officers have now received instructions that they are to confine their efforts to maintaining the neutrality of the waters within the 3-mile limit, and are not to fire on belligerent ships operating outside that limit. (Ibid. p. 118.)

The limits of territorial waters, stated in other proclamations and decrees, varied.

The United States and Italy, 1914.—A royal decree of August 6, 1914, "for the purposes of neutrality," fixed the limit of Italian territorial waters at 6 nautical miles and further provided that—

ART. 2. In bays, bights, and gulfs, territorial waters, for the purposes set forth in the foregoing article, lie within a straight outward line tangent to 2 circumferences with a 6-mile radius and having their centers at the extreme points of the opening of the bay, bight, or gulf; provided the distance between the said points does not exceed 20 nautical miles (37,040 meters).

If the distance between the extreme points of the opening exceeds 20 nautical miles, the territorial waters lie within a straight line drawn between the 2 outermost points of the bay, bight, or gulf separated by a distance of at least 20 nautical miles." (1914 For. Rel. Sup., p. 664.)

The above action was made known to the Department of State of the United States by the Italian Ambassador and the receipt of the information was acknowledged.

In a note of November 6, 1914, the Italian Ambassador said to the Secretary of State:

Whether because of the fact that the limits of the marginal sea are not regulated by international conventions or general rules of international law—thus leaving every state at liberty

to fix them within the sphere of its own sovereignty without subjecting its decision to the recognition of the other states—or because of the fact that no comment was made by your excellency on the Royal Embassy's communications, His Majesty's Government knows that no objections are made by the Federal Government to the 6-mile limit set by us on our territorial waters for the purposes of neutrality.

Yet, with a view to removing any possible uncertainty, His Majesty's Government would be very thankful for a declaration which would explicitly convey acceptance by the Federal Government of the decision as adopted. And, in compliance with instructions I have just received on the subject, I have the honor to apply to your excellency's tried courtesy for such a declaration. (Ibid. p. 665.)

On November 28, the Acting Secretary of State replied:

I am compelled to inform your excellency of my inability to accept the principle of the royal decree in so far as it may undertake to extend the limits of the territorial waters beyond 3 nautical miles from the main shore line and to extend thereover the jurisdiction of the Italian Government.

An examination into the question involved leads to the conclusion that the territorial jurisdiction of a nation over the waters of the sea which wash its shore is now generally recognized by the principal nations to extend to the distance of 1 marine league or 3 nautical miles, that the Government of the United States appears to have uniformly supported this rule, and that the right of a nation to extend, by domestic ordinance, its jurisdiction beyond this limit has not been acquiesced in by the Government of the United States.

There are certain reasons, brought forward from time to time in the discussion of this question and advanced by writers on international law, why the maritime nations might deem the way clear to extend this determined limit of 3 miles, in view of the great improvement in gunnery and of the extended distance to which, from the shore, the rights of nations could be defended; but it seems manifestly important that such a construction or change of the rule should be reduced to a precise proposition and should then receive in some manner reciprocal acknowledgement from the principal maritime powers; in fine, that the extent of the open or high seas should better be the result of some concerted understanding by the nations whose vessels sail them than be left to the determination of each particular nation, influenced by the interests which may be peculiar to it. (Ibid. p. 666.)

Later, on December 12, 1914, the Secretary informed the Italian Ambassador —

That upon further consideration of this subject, while the department is obliged to adhere to the opinions expressed in its note of the 28th ultimo, it has taken steps to furnish the department of the Navy with a copy of the diplomatic correspondence on this matter, with the request that orders be issued to the public ships of the United States notifying them of the royal decree of August 6 last mentioned above, and giving such further instructions as may be appropriate with a view to avoid so far as is possible any incident which may raise a question between the Governments of Italy and the United States as to the extent of the territorial waters of the former country. (Ibid. p. 666.)

Hovering, 1915–16.—The correspondence between the American and British Governments in regard to operations of British vessels of war off the coast of the United States during the World War touched upon the limits of jurisdiction. The British maintained their right to cruise beyond the 3-mile limit and the State Department said:

In reply it may be stated that the Government of the United States advances no claim that British vessels which have been and are cruising off American ports beyond the 3-mile limit have not in so doing been within their strict legal rights under international law. The grounds for the objection of the Government of the United States to the continued presence of belligerent vessels of war cruising in close proximity to American ports are based, not upon the illegality of such action but upon the irritation which it naturally causes to a neutral country. (Spec. Sup. 10 Amer. Jour. Int. Law, p. 384.)

The "Elida."—The German Imperial Supreme Court in Berlin in 1915 had before it a case involving the extent of maritime jurisdiction in time of war. In the discussion of the case of the *Elida*, May 18, 1915, the court said:

It is true that a considerable number of States have extended by national law their territorial jurisdiction beyond the 3-mile limit, either generally or with regard to certain legal rights. This particularly applies to Sweden and Norway, which extended their national waters to a distance of 4 miles. A number of

other States even went much further in this respect. But a special international title, valid in relation to the German Empire, and therefore to be taken into account by the prize court, does not exist, for up to the present time the Swedish claim has been recognized only by the Norwegian Government. According to official information from the German Foreign Office, Germany especially in the course of the discussions concerning this matter which took place in 1874, did not accept Sweden's point of view but treated the question of national waters as an open one, while England insisted upon the 3-mile limit. Similarly in 1897, when the Swedish Government addressed a communication to the German Legation at Stockholm concerning the fishery jurisdiction, the German Government restricted itself to raising no objection against Sweden's claim to a 4-mile boundary for the fishery and the question of the neutralization of this marine area in case of war was not thereby affected. * * *

Heretofore the maritime boundary of States has been generally recognized in theory and practice as being 3 nautical miles distance from the coast. Originally it was based on the carrying distance, corresponding to the gunnery technique of those times, of ships and coast guns. It is true that nowadays this reason is no longer applicable. Here, however, the axiom cessante ratione non cessat lex ipsa applies, and although numerous proposals and opinions have been put forward with regard to a different delimitation of the national waters, it can not be asserted that any other method has in practice met with the general concurrence of the maritime States. * * *

Furthermore, it must be remembered that even if the exercise by a maritime nation of certain official functions, such as those of the health and customs authorities, is tolerated beyond the 3-mile zone, this by no means represents a concession to the effect that in all other respects the waters in question are included within the territorial jurisdiction. * * *

The British Government during the negotiations in the year 1911 with regard to the holding of an international congress for the regulation of the question of coastal waters, decidedly adhered to the 3-mile zone; and, accordingly, even in the present war, it had Admiral Craddock inform the Government of Uruguay that it would not recognize the claims of Uruguay and Argentina to an extension of the territorial waters beyond the 3-mile zone. It can, therefore, be still less assumed that this boundary has been supplanted by another generally acknowledged international regulation. (Translation, 10 Amer. Jour. Int. Law, p. 916; 1 Entscheidungen des Oberprisengerichts [1915], No. 9.)

The "Bangor."—In the case of the *Bangor*, a Norwegian vessel captured on the ground of unneutral service in the Straits of Magellan, March 14, 1915, the question of the jurisdiction of neutral waters was raised. The British prize court passed upon this case on May 30, 1916, and said, as to the waters of a neutral State:

> Upon the assumption made for the purposes of this case that the *Bangor* was in fact captured within the territorial waters of a neutral, the question is whether the vessel was immune from legal capture and its consequences according to the law of nations. In other words, can the owners of the vessel, who are, ex hypothesi, to be treated as enemies, rely upon the territorial rights of a neutral State and object to the capture? Or must the objection to the validity of the capture come from the neutral State alone?
>
> No proposition in international law is clearer or more surely established than that a capture within the territorial waters of a neutral State is, as between enemy belligerents, for all purposes rightful, and that it is only by the neutral State concerned that the legal validity of the capture can be questioned. * * *
>
> Assuming for the purpose of this judgment that Convention XIII is binding, it is clear that the convention was only directed to the relations between neutral powers and belligerent powers, and was only intended to apply to questions arising between neutral powers and belligerent powers as such. Its provisions were not intended to deal with any question between belligerents, and did not affect the rule relating to capture in territorial waters of a neutral State as between two belligerent powers, where the neutral State did not intervene.
>
> For these reasons I decide that the objection made by the claimants to the validity of the capture, even if it took place in neutral territorial waters, is not well founded, and I disallow the claim with costs. ([1916] P. 181; 5 Lloyd's Prize Cases, p. 308.)

Treaties.—The treaties concluded with a view to making effective the provisions of legislation of the United States in regard to the smuggling of intoxicating liquors are of two categories. One group of treaties recognizes the 3-mile limit and another group leaves the matter without prejudice.

In the treaties of the United States with Great Britain, January 23, 1924 (43 U. S. Stat., pt. 2, p. 1761); Cuba,

March 4, 1926 (44 U. S. Stat., pt. 3, p. 2395); Germany, May 19, 1924 (43 U. S. Stat., pt. 2, p. 1815) The Netherlands, August 21, 1924 (44 U. S. Stat., pt. 3, p. 2013); and Panama, June 6, 1924 (43 U. S. Stat., pt. 2, p. 1875), the provisions of Article I made pronouncement similar to the following:

> The High Contracting Parties declare that it is their firm intention to uphold the principle that 3 marine miles extending from the coastline outward and measured from low-water mark constitute the proper limits of territorial waters.

The corresponding article with certain other states reads as follows:

> The High Contracting Parties, respectively, retain their rights and claims, without prejudice by reason of this agreement, with respect to the extent of their territorial jurisdiction. Belgium (U. S. Treaty Series, No. 759, Dec. 9, 1925); Denmark, May 29, 1924 (43 Stat. pt. 2, p. 1809); France (U. S. Treaty Series, No. 755, June 30, 1924); Italy, June 3, 1924 (43 Stat. pt. 2, p. 1844); Norway, May 24, 1924 (43 Stat. pt. 2, p. 1772); Spain omits "and claims", Feb. 10, 1926 (44 Stat., pt. 3, p. 2465); and Sweden, May 22, 1924 (43 Stat., pt. 2, p. 1830).

Opinion of Supreme Court.—On April 30, 1923, the Supreme Court of the United States said: "It now is settled in the United States and recognized elsewhere that the territory subject to its jurisdiction includes the land areas under its dominion and control, the ports, harbors, bays, and other inclosed arms of the sea along its coast, and a marginal belt of the sea extending from the coast line outward a marine league, or 3 geographic miles." (Cunard S. S. Co. *v.* Mellon (1923) 262 U. S. 100.)

Central American Court of Justice, 1917.—In the case between the Republic of El Salvador and the Republic of Nicaragua decided March 9, 1917, referring to the Gulf of Fonseca, the court said:

> The theory that the high party defendant accepts as the true test of the territoriality of the gulf is one that must be examined in the light of the distances traced on the maps, because they give an idea of the real, or at least probable, extent of the gulf. The

geographer Squier fixes it approximately at 50 miles in length by 30 in width. The technical study by the engineers Barberena and Alcaine declares the existence of two zones in which, according to the law of nations and the internal laws of the riparian States, they may exercise their jurisdiction, to wit, the zone of 1 marine league contiguous to the coasts, wherein the jurisdiction is absolute and exclusive, and the further zone of 3 marine leagues, wherein they may exercise the right of *imperium* for defensive and fiscal purposes. (11 Amer. Jour. Int. Law, pp. 674, 706.)

British attitude, 1923.—In reply to a question as to the Russian claim to a 12-mile zone for fishing rights, the Undersecretary of State for Foreign Affairs said, April 30, 1923:

The doctrine of territorial waters is not laid down in any international instrument, but the jurisdiction of nations over their coastal waters has been accepted by usage and is now a recognized rule of international law; His Majesty's Government have always maintained that by international law and practice the general limit of territorial jurisdiction is 3 miles, but from time to time claims to extend the 3-mile limit have been advanced by different States. Such claims, which amount to annexation of the high seas, could only be made effective by international agreement. (163 House of Commons Debates, 5 s., p. 961.)

The "Fagernes."—On March 17, 1926, a collision in the Bristol Channel occurred 10½ or 12½ miles off the English coast and 9½ or 7½ miles off the Welsh coast. In this collision the steamship *Fagernes* was sunk and the steamship *Cornish Coast* was damaged. The lower court held that the collision occurred within British jurisdiction and the case was then brought to the court of appeal and it was argued that the part of the Bristol Channel in question was within the pilotage district, and therefore within the sovereignty of Great Britain. The Attorney General in response to a request from the court said that he had been instructed by the Secretary of State for Home Affairs to say that—

The spot where this collision is alleged to have occurred is not within the limits to which the territorial sovereignty of His Majesty extends. ([1927] P. 311, 319, C. A.)

In the opinion of Bankes L. J. it is stated that in international law writers and jurists do not agree in their opinions as to the extent of territorial waters. Lawrence L. J. in agreeing that the waters where the collision took place were not within British jurisdiction said:

> It is common ground that there is no international treaty or convention expressly sanctioning or recognizing any territorial rights of the Crown over the Bristol Channel. Further, no evidence has been adduced that the Crown has possessed itself of, or has effectively asserted any territorial rights over, that part of the Bristol Channel where the collision occurred. In the absence of any express treaty or controlling executive act of the Government, the question arises whether there is any established general rule of international law for determining the territorial character of bays. The consideration of this question has occupied the greater part of the hearing both in the court below and in this court.
>
> The Attorney General, in the course of his able argument, has cited and commented upon the opinion of jurists, the practice of nations and the relevant judicial decisions. I do not propose to deal with these sources of information in detail, but content myself by saying that in my judgment the Attorney General has established the proposition that, although the principle of claiming territorial rights over bays is well established as a rule of international law, and although there is no question as to the applicability of that principle in the case of bays, the entire land boundaries of which form part of the territory of the same state and the entrances of which do not exceed 6 sea miles in width, yet there is no recognized general rule of international law by which it can be determined whether any given bay, with an entrance wider than 6 sea miles, does or does not form part of the territory of the State whose shores form its land boundary. Each such case must depend upon its own special circumstances. (Ibid. 311, 327.)

Some of the early contentions of Great Britain were not in accord with this decision. Some of the judges of the court of appeal testified they would have agreed with the judgment of the lower court if they had been sitting with similar evidence before them. There was, however, a plain statement of the Government and a decision in accord with it that these waters were not within British jurisdiction. Lord Justice Bankes stated that the reply

of the Crown, though given at the instance of the court and for the information of the court, did not in his opinion "necessarily bind the court in the sense that it is under an obligation to accept it."

High sea and national legislation.—The rights of states in the high seas are now regarded as fundamental. Fundamental rights are never renounced by states without express and clearly intended act as by an international convention or by a proclamation, e. g., Panama by the convention of 1903 grants to the United States "all the rights, power, and authority within the zone which the United States would possess and exercise if it were sovereign." Panama does not renounce or grant sovereignty and the United States pays $250,000 per year to Panama "as the price or compensation for the rights, powers, and privileges granted in this convention."

The freedom of the sea outside the 3-mile limit is a generally recognized right which no single state may limit. Laws enacted by certain states sometimes seem to be contrary to international law but courts have regularly held that such a construction of the law ought not to be admitted. In the case of the *Charming Betsey*, 1804, Chief Justice Marshall, in referring to neutral rights said:

> It has also been observed that an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains, and consequently can never be construed to violate neutral rights, or to affect neutral commerce, further than is warranted by the law of nations as understood in this country. (2 Cranch Reports, Supreme Court, p. 64.)

In an earlier decision Chief Justice Marshall admitted that—

> "The laws of the United States ought not, if it be avoidable, so to be construed as to infract the common principles and usages of nations, or the general doctrines of national law." (Talbot *v.* Seeman, 1801, 1 Cranch Reports, Supreme Court, p. 1.)

Other states have taken the same attitude in regard to domestic legislation affecting rights on the high sea.

In international communications and agreements the United States has for many years upheld the 3-mile limit as the extent of territorial waters.

Such recent international agreement as that relating to the Aaland Islands, October 20, 1921, states that—

> The territorial waters of the Aaland Islands are considered to extend for a distance of 3 marine miles from the low-water mark on the islands, islets, and reefs not permanently submerged.

In general it may be maintained that the right of a state to protect itself and to be secure is fundamental and this is not lessened because other states engage in war, e. g., retaliation even should not in time of war be aimed at neutrals though neutrals may be indirectly injured by retaliation. Belligerents do not by their declaration of war acquire rights to injure neutrals, e. g., *Alabama* and *Kearsarge*, 1864, of which Mr. Bayard said in 1886, "We claim also that the sovereign of the shore has the right, on the principle of self defense to pursue and punish marauders on the sea to the very extent to which their guns would carry their shot, and that such sovereign has jurisdiction over crimes committed by them through such shot, although at the time of the shooting they were beyond 3 miles from the shore." (Letter to Mr. Manning, Secretary of Treasury, 1 Moore, p. 721.) A state may also determine the conditions of entrance or even prohibit the entrance of vessels of war both in time of peace and in time of war, e. g., the Netherlands, declaration of neutrality, August 5, 1914.

SOLUTION

(*a*) (1) The right of visit and search beyond the 3-mile limit upon the high sea is an undeniable belligerent right and the authorities of the United States can afford no protection against its lawful exercise.

(2) The protest of the *Cygnet* is not valid, as these waters are not, for the purposes of neutrality, within the jurisdiction of the United States.

(*b*) The authorities of the United States may use the means at their disposal to prevent the diffusion of dangerous gas within 3 miles of the coast.

(*c*) The authorities of the United States may exclude from its harbors vessels having dangerous gas on board, or may prescribe the conditions of entrance thereto for such vessels.

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sioned mail packets are free to enter and depart." In November of the same year the Portuguese Government notified Great Britain that in respect to the blockade of the River Douro "positive instructions had been given to the ships of war establishing the blockade to allow the British ships of war to enter the port unmolested, and not to prevent the delivery and reception there of the mails conveying the correspondence or the landing of passengers or even the departure of British subjects who may wish to embark in the packets." (35 British and Foreign State Papers, 862.)

While there had been differences of opinion as to the treatment which mails should receive in time of war, these became more marked during the Civil War in the United States, 1861–1865. There was much correspondence upon this subject beginning early in the war. There was long correspondence relating to the seizure of the *Adela*, a British merchant vessel having mail on board. On October 10, 1862, Earl Russell in a letter to the British Minister at Washington said:

> It is desirable that you should ascertain from Mr. Seward whether the Government of the United States admits the principle that Her Majesty's mail bags shall neither be searched nor detained. (Parliamentary Papers, North America, No. 5, 1863, p. 5.)

A part of this letter of October 10, 1862, not printed in this Parliamentary Paper, No. 5, appears in No. 10 as follows:

> The question which has arisen in this case as to the seizure of Her Majesty's mails on board the *Adela*, while it forms a new and very important element in this case, deserving very grave consideration, raises a point of some delicacy and difficulty. Her Majesty's Government can not doubt that the Government of the United States are prepared to concede that all mail bags, clearly certified to be such, shall be exempt from seizure or visitation, and that some arrangement shall be made for immediately forwarding such bags to their destination in the event of the ship which carries them being detained. If this is done, the necessity

for discussing the claim, as a matter of strict right, that her Majesty's mails, on board a private vessel, should be exempted from visitation or detention, might be avoided; and it is, therefore, desirable that you should ascertain from Mr. Seward whether the Government of the United States admits the principle that Her Majesty's mail bags shall neither be searched nor detained.

In the further correspondence at this time, the attitude of the United States and Great Britain is shown in notes exchanged between Secretary Seward and the British Chargé, Mr. Stuart:

Mr. Stuart to Mr. Seward

WASHINGTON, *October 29, 1862.*

SIR: Referring to our conversation of this morning, I beg to state, in order to prevent misapprehension, that the principle which my Government expects that you will admit, is that all mail bags, clearly certified to be such, shall be exempt from seizure and visitation, and that some arrangement shall be made for immediately forwarding such bags to their destination in the event of the ship which carries them being detained.

If this principle, is admitted, the necessity for discussing the claim, as a matter of strict right, that Her Majesty's mails on board a private vessel should be exempt from visitation or detention might be avoided.

I therefore hope that you will allow me to inform Lord Russell that there will be no difference of opinion between the two Governments on the point in question.

I am, etc.

(Signed) W. STUART.

Mr. Seward to Mr. Stuart

DEPARTMENT OF STATE,
Washington, November 3, 1862.

Mr. Seward presents his compliments to Mr. Stuart, and with reference to his private note of the 29th ultimo, relative to the exemption of Her Britannic Majesty's mail bags on board of private vessels, from visitation or detention, has the honor to inclose herewith the copy of a letter which has since been addressed by this department to the Secretary of the Navy on the subject.

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Mr. Seward to Mr. Welles

DEPARTMENT OF STATE,
Washington, October 31, 1862.

SIR: It is thought expedient that instructions be given to the blockading and naval officers that, in case of capture of merchant vessels suspected or found to be vessels of the insurgents or contraband, the public mails of any friendly or neutral power, duly certified and authenticated as such, shall not be searched or opened, but be put, as speedily as may be convenient on their way to their designated destinations. This instruction, however, will not be deemed to protect simulated mail-bags, verified by forged certificates or counterfeited seals.

I have, etc.

(Signed) WILLIAM H. SEWARD.

(Ibid. p. 6.)

The instructions of the Secretary of the Navy of the United States to flag officers relative to the right of visit and search on August 18, 1862, stated:

Fourthly: That to avoid difficulty and error in relation to papers which strictly belong to the captured vessel, and mails that are carried or parcels under official seals, you will in the words of the law, "preserve all the papers and writing found on board and transmit the whole of the originals unmutilated to the judge of the district to which such prize is ordered to proceed," but official seals or locks or fastenings of foreign authorities, are in no case, nor on any pretext, to be broken, or parcels covered by them read by any naval authorities, but all bags, or other things covering such parcels, and duly seized and fastened by foreign authorities, will be in the discretion of the United States officers to whom they may come, delivered to the consuls, commanding naval officers, or legation of the foreign government to be opened, upon the understanding that whatever is contraband or important as evidence concerning the character of the captured vessel will be remitted to the prize court, or to the Secretary of State at Washington, or such sealed bag or parcels may be at once forwarded to this department to the end that the proper authorities of the foreign government may receive the same without delay. (Official Records, War of the Rebellion, Series I, vol. 1, p. 417.)

This order was a somewhat amplified form of instructions transmitted by Secretary of State Seward to Secretary of Navy Welles by direction of the President.

Welles did not approve the latter part of this order and maintained that the mails should be placed in the custody of the court. In his diary of April 13, 1863, Welles says:

> On the 18th of August last I prepared a set of instructions embracing the mails, on which Seward had unwittingly got committed. The President requested that this should be done in conformity with certain arrangements which Seward had made with the foreign ministers. I objected that the instructions which Mr. Seward had prepared in consultation with the foreigners were unjust to ourselves and contrary to usage and to law, but to get clear of the difficulty they were so far modified as not to directly violate the statutes, though there remained something invidious toward naval officers which I did not like. The budget of concessions was, indeed, wholly against ourselves, and the covenants were made without any accurate knowledge on the part of the Secretary of State when they were given of what he was yielding. But the whole, in the shape in which the instructions were finally put, passed off very well. Ultimately, however, the circular containing among other matters these instructions by some instrumentality got into the papers, and the concessions were, even after they were cut down, so great that the Englishmen complimented the Secretary of State for his liberal views. (1 Diary of Gideon Welles, p. 269.)

Under a later date, April 21, 1863, Mr. Welles indicates that Mr. Seward inferred that Great Britain regarded the arrangement in regard to mails as reciprocal though Welles does not so regard what had been said.

In a letter to Secretary Seward of April 11, 1863, Lord Lyons protested against holding mails from the *Peterhoff* and these were subsequently forwarded to their destination. (Diplomatic Correspondence, U. S. 1863, Pt. 1, p. 505, 510.)

Instructions as to mails.—Instructions from time to time had provided for the treatment of mails. Lushington's British Manual of Naval Prize Law of 1866 had stated in the introduction (p. xii) that:

> The right to search mail steamers and mail bags threatens to become a very great inconvenience to neutrals, in consequence of the rapid development of postal and passenger services. But, to

give up the right of searching mail steamers and mail bags altogether, at all events when they are destined to a hostile port, is a sacrifice which can hardly be expected of belligerents. In the event of a naval war it is probable that special instructions will be issued regulating the duties of commanders in this respect. The subject, accordingly, is not treated in this book.

But the edition of Holland in 1888 states:

102. The mail bags carried by mail steamers will not in the absence of special instructions, be exempt from search for enemy dispatches.

French instructions of 1870 had provided for the sending of mail to the Government authorities, though later the word of the postal agent on board was accepted as to the character of the mail matter.

The United States in the Spanish-American War, 1898, proclaimed that, "The voyages of mail steamers are not to be interfered with except on the clearest grounds of suspicion of a violation of law in respect of contraband or blockade." (1898, For. Rel. U. S., p. 781.) The same principle had been proclaimed by other states in earlier wars and had been embodied in treaty provisions between some of the leading commercial powers. The exemption from interference was grounded upon the desire to protect from interference the increasing peaceful interest served by the postal system.

The Japanese regulations of 1904 embodied advanced ideas:

ART. XXIV. In visiting or searching a neutral mail ship, if the mail officer of the neutral country on board the ship swears in a written document that there are no contraband papers in certain mail bags those mail bags shall not be searched. In case of grave suspicion, however, this rule does not apply.

ART. LXVIII. When a mail steamer is captured mail bags considered to be harmless shall be taken out of the ship without breaking the seal, and steps shall be taken quickly to send them to their destination at the earliest date.

Secretary Hay in a note to the representative of the United States said:

Any interruption of regular postal communication entails such serious inconvenience to various interests that, apart from the provisions of treaty, a usage has in recent years grown up to exempt neutral mails from search or seizure. In presenting this matter to the Russian Government you will refer to this fact and express the confidence of this Government that, in its treatment of the subject, the Russian Government will recognize the liberal tendency of recent international usage to exempt neutral mails from molestation. (1904 For. Rel. U. S., p. 772.)

The practice in regard to the treatment of postal correspondence was, however, by no means uniform nor could any rule be said to be generally accepted.

The "Panama," 1900.—During the course of the Spanish-American War, 1898, the *Panama*, a Spanish steamer was captured and brought before a prize court which declared the vessel lawful prize. The case was appealed to the Supreme Court which in the decision said:

It was argued in behalf of the claimant that, independently of her being a merchant vessel, she was exempt from capture by reason of her being a mail steamship and actually carrying mail of the United States.

There are instances in modern times, in which two nations, by convention between themselves, have made special agreements concerning mail ships. But international agreements for the immunity of the mail ships of the contracting parties in case of war between them have never, we believe, gone farther than to provide, as in the postal convention between the United States and Great Britain in 1848, in that between Great Britain and France in 1833, and in other similar conventions, that the mail packets of the two nations shall continue their navigation, without impediment or molestation, until a notification from one of the Governments to the other that the service is to be discontinued; in which case they shall be permitted to return freely, and under special protection, to their respective ports. And the writers on international law concur in affirming that no provision for the immunity of mail ships from capture has as yet been adopted by such a general consent of civilized nations as to constitute a rule of international law. (9 Stat. 969; Wheaton (8th ed.), pp. 659–661, Dana's note; Calvo (5th ed.) §§ 2378, 2809; De Boeck, §§ 207, 208.) De Boeck, in § 208, after observing that in the case of mail packets between belligerent countries, it seems difficult to go farther than in the convention of 1833, above men-

tioned, proceeds to discuss the case of mail packets between a belligerent and a neutral country, as follows: "It goes without saying that each belligerent may stop the departure of its own mail packets. But can either intercept enemy mail packets? There can be no question of intercepting neutral packets, because communications between neutrals and belligerents are lawful, in principle, saving the restrictions relating to blockade, to contraband of war, and the like; the right of search furnishes belligerents with a sufficient means of control. But there is no doubt that it is possible, according to existing practice, to intercept and seize the enemy's mail packets." (176 U. S. Supreme Court Reports [1900], p. 535.)

Mails, 1900–1907.—There had been a growing sentiment in favor of exempting postal correspondence from interference as far as this might be possible. The decisions of courts as in the case of the *Panama* had not found uniform support. In the case of the *Argun*, a Russian vessel taken by the Japanese in 1904, the Higher Prize Court at Sasebo said, "But the fact of an enemy's vessel carrying the mails is not recognized in the international law now in force, or in the laws of Japan, as a ground of exemption from capture, so that this point of the protest is overruled." (Takahashi, Int. Law, Russo-Japanese War, p. 579.) There had been protests against the interference by Russia with neutral mail vessels. The drift of opinion at that time led to the statement in the Naval War College, International Law Topics, 1906, of the conclusion in which it was said:

(*a*) Neutral mail or passenger vessels, of regular lines established before and not in contemplation of the outbreak of hostilities, bound upon regular voyages and furnishing satisfactory government certification that they are mail or passenger vessels, and do not carry contraband, are exempt from interference except on ample grounds of suspicion of action not permitted to a neutral.

(*b*) Mail or passenger vessels of belligerents, of similar lines, upon regular voyages, plying to neutral ports should be exempt from interference under such restrictions as will prevent their use for war purposes.

(*c*) Mail or passenger vessels, similarly plying between belligerent ports, may, under such restrictions as the belligerents may agree upon, be exempt from interference. (1906, Naval War College, Int. Law Topics, p. 104.)

In the arguments used in support of these principles, it was said:

At the present time, with the possibilities of telegraphic communication, it hardly seems reasonable to imagine that important war correspondence of a belligerent will be intrusted to the ordinary course of the mails. Other means are so much more rapid and time is such an important element in warfare that it would seem that only in rare instances would dispatches of importance to the captor be intrusted to the mails. Dispatches thus sent would be liable to delay, loss, and other accidents. It may be that, like some other regulations, they may come so late that the necessity for their existence may have disappeared. Much of the important business of the world in time of peace is now carried on by means of the telegraph. A much greater proportion is intrusted to the telegraph in time of war. (Ibid. p. 93.)

Somewhat similar arguments were used before The Hague Peace Conference in 1907.

The Hague Conference, 1907.—Doctor Kriege of Germany presented to The Hague Peace Conference in 1907 a proposition that postal correspondence on the high seas whatever its character should be inviolable. In supporting this proposition he said:

We believe that it would be of advantage to establish the principle that postal correspondence forwarded by sea is inviolable.

Postal relations have in our time such importance, there are so many commercial and other interests dependent on the regularity of the mails, that it is highly desirable to protect them from the disturbance which might be caused by naval warfare. On the other hand, it is hardly likely that belligerents, who have at their disposal for the transmission of their dispatches the channels of telegraphy and radiotelegraphy would resort to the ordinary mails for official communications relating to military operations. The advantages to be derived by belligerents from control of the postal service is not to be compared with the harm done legitimate commerce by the exercise of this control.

The most effective means of attaining this object would be to free from all control vessels engaged in regular mail service. However, there does not seem to be much likelihood that such action will be taken. We must confine ourselves to proclaiming that belligerents must take into consideration the special character of such vessels and abstain, so far as possible, from exercising the right of search aboard them. But inviolability of the correspondence itself should be absolute, whatever may be the

nationality of the vessel carrying it. Belligerents would have no right, in case of the seizure of a mail steamer, to break the seals of bags containing letters for the purpose of examining them, and they would be bound to take necessary measures to insure their prompt delivery at their destination. (3 Proceedings Hague Peace Conference, 1907, translation, Carnegie edition, p. 851.)

XI Hague Convention, 1907.—After discussion the conference adopted Convention XI relative to certain restrictions with regard to capture in maritime war, containing the following articles:

ARTICLE 1. The postal correspondence of neutrals or belligerents, whatever its character may be, official or private, found on board a neutral or enemy ship at sea, is inviolable. If the ship is detained, the correspondence is forwarded by the captor with the least possible delay.

The provisions of the preceding paragraph do not apply, in case of violation of blockade, to correspondence destined for, or proceeding from, the blockaded port.

ART. 2. The inviolability of postal correspondence does not exempt a neutral mail ship from the laws and customs of maritime war as to neutral merchant ships in general. The ship, however, must not be searched except in case of necessity, and then with as much consideration and expedition as possible. (I, Ibid. p. 656.)

The French version is official and is as follows:

ARTICLE 1. La correspondance postale des neutres ou des belligérants, quel que soit son caractère official ou privé, trouvée en mer sur un navire neutre ou ennemi, est inviolable. S'il y a saisie du navire, elle est expédiée avec le moins de retard possible par le capteur.

Les dispositions de l'alinéa précédent ne s'appliquent pas, en case de violation de blocus, à la correspondance qui est à destination ou en provenance du port bloqué.

ART. 2. L'inviolabilité de la correspondance postale ne soustrait pas les paquebots-poste neutres aux lois et coutumes de la guerre sur mer concernant les navires de commerce neutres en général. Toutefois, la visite n'en doit être effectuée qu'en cas de nécessité, avec tous les ménagements et toute la célérité possibles. (I, Deuxième Conférence Internationale de la Paix, p. 664.)

This convention was ratified by the greater powers except Russia. It was stated in the conference that

parcel post was excluded "from the privileged treatment accorded to postal correspondence." The attitude of all states might be said to be favorable to inviolability of postal correspondence at the outbreak of the World War in 1914.

In the consideration of postal correspondence the words were understood to mean communications in writing entrusted to the regular mails. The means of transportation of the mails were not exempt from the consequences of the war but the mails were not to be unnecessarily delayed. The object was to facilitate communication and to do this with the minimum of interference.

En mer.—The French words "en mer" are official and have been translated into English as "at sea" and "on the high seas."

The words "en mer" are also used in the Sixth Hague Convention of 1907 relative to merchant vessels at the outbreak of hostilities. Article 3 provides:

> Les navires de commerce ennemis, qui ont quitté leur dernier port de départ avant le commencement de la guerre et qui sont rencontrés en mer ignorants des hostilités, ne peuvent être confisqués. Ils sont seulement sujets à être saisis, moyennant l'obligation de les restituer après la guerre sans indemnité, ou a être réquisitionnés, ou même à être détruits, à charge d'indemnité et sous l'obligation de pourvoir à la securité des personnes ainsi qu'à la conservation des papiers de bord.
>
> Après avoir touché à un port de leur pays ou à un port neutre, ces navires sont soumis aux lois et coutumes de la guerre maritime. (I, Deuxiéme Conférence Internationale de la Paix, p. 645.)

In the case of the German sailing vessel, the *Möwe*, before the British Prize Court in November, 1914, one of the questions was as to whether the vessel taken in the Firth of Forth was "at sea within the meaning of the Sixth Hague Convention of 1907." The counsel for the owners of the vessel argued that the vessel was seized in port and could only be detained, while the Crown contended that the vessel was captured at sea and ought to be condemned.

Alternatively, it was alleged, but not proved, that she was taken in "territorial waters," and that, therefore, she was not captured on the high seas. But I will assume that she was within territorial waters when the capture was made. In my view that is wholly immaterial.

The Sixth Hague Convention does not refer to "territorial waters." A vessel might be in territorial waters for scores of miles either innocently or nefariously, and pass numerous ports without any intention to enter any of them. It is idle to say that on this account she would be free from capture. * * *

To illustrate the meaning of the word "port" in the conventions I would further observe that the word "ports" is used in various places in conjunction with, but in contradistinction to, roadsteads and to territorial waters. (See Convention XIII, where the words "les ports, les rades, ou les eaux territoriales" are frequently used.)

In my view the claimant in his affidavit was accurate when he said his vessel was "taken at sea." The words of article 3 "recontrés en mer" are exactly applicable to this case. And I have no hesitation in finding that the vessel was captured at sea, and not seized in port.

I therefore decree that the vessel be condemned as lawful prize. (The *Möwe*, P [1915] p. 1.)

Early period of World War.—During the early period of the World War the attitude favorable to the inviolability of postal correspondence, broadly interpreted, continued and a liberal interpretation was given to the Eleventh Hague Convention. The regulations of the United States, France, Germany, Japan, and some other states embodied the provisions of the Eleventh Hague Convention. Some states permitted the seizure of letters addressed to authorities or to persons residing in enemy territory or territory occupied by the enemy. Such mail might be forwarded to the naval or other authorities.

The Secretary of State on August 10, 1914, informed the Austro-Hungarian Ambassador that there was no foreign mail originating in the United States "left on hand in New York," and that mails were being dispatched to the Central Powers three or four times per week. The mail for the Central Powers which reached

Great Britain before August 8, 1914, was returned as undeliverable. The French Ambassador in a communication replying to Acting Secretary of State Lansing in regard to certain mail addressed to but not delivered in Germany said on September 28, 1914:

MY DEAR MR. COUNSELOR: I am sorry to hear that Mr. George S. Viereck's letters have not been received in Germany, but I do not see in what way I can usefully interfere in order to secure for him a better postal service in the present circumstances.

All postal communication is, of course, suppressed between belligerent countries. If Mr. Viereck sends his letters by way of England or of France, they are sure not to reach Germany any more than the letters of any Englishman or any Frenchman. His only chance, as I take it, is for him to use neutral ships, such as the Dutch ones or any other.

Believe me [etc.],

JUSSERAND.

(1914 For. Rel. U. S., Supplement, p. 534.)

On October 12, 1914, the American Ambassador in Great Britain informed the Secretary of State that—

Sir Edward Grey now informs me after investigation that the United States mail on board S. S. *Noordam* was not interfered with by British officials. He asks me to say that if the report of interference with it has arisen from the fact that any of the letters in question were found to be opened when they reached their destination, he would be glad if a specimen of such envelopes could be submitted for further investigation. (Ibid. p. 534.)

Later period of World War.—After the first months of the World War various restrictions upon the transmission of mails began to be established. Censorship of a moderate type in the early weeks soon became very comprehensive. Even communications between the consuls in neutral countries with their fellow consuls in belligerent countries and vice versa were opened and censored. On October 14, 1914, the Acting Secretary of State in a dispatch to the American Ambassador in Great Britain said:

DEPARTMENT OF STATE,
Washington, October 22, 1914, 8 p. m.

378. Your dispatches No. 467, September 19, and No. 470, September 24. Department is of opinion that correspondence in time

of war between diplomatic and consular officers in different countries sent by ordinary mail may be subject to censorship in the same manner as other private letters. But pouches under seal passing between diplomatic missions of the United States by mail or courier ought not in the opinion of this Government to be opened or molested by censors or other officials of foreign governments. The same may be said of any official correspondence under seal between diplomatic or consular officers and the Department of State. Please report any instances of opening mails contrary to these rules. (1914 For. Rel. U. S. Supplement, p. 538.)

Several belligerents issued regulations to the effect that consular officers should leave unsealed their correspondence addressed to foreign countries. So many protests and complaints were received that the Secretary of State on November 25, 1914, proposed to the belligerent governments the following for regulations for transmission of American diplomatic and consular correspondence:

1. All correspondence between American diplomatic and consular officers within Austrian territory to be inviolable if under seal of office.

2. No correspondence of private individuals to be forwarded by diplomatic and consular officers under official cover or seal.

3. Official correspondence between American diplomatic officers residing in different countries is not to be opened or molested if under seal of office.

4. Official correspondence under seal of office between the Department of State and American diplomatic and consular officers is not to be opened or molested.

5. Pouches under seal passing between American diplomatic missions by mail or courier not to be opened or molested.

6. Correspondence other than that described in [the] foregoing sent by ordinary mail to be subject to usual censorship. (Ibid. p. 542.)

These regulations were approved by some of the governments, but many controversies arose in regard to mails of all kinds. It was also argued that the Eleventh Hague Convention did not apply because it had not been ratified by Bulgaria, Italy, Montenegro, Russia, Serbia, and Turkey.

Interference with American mail.—The United States had many interests in all the belligerent states and large

correspondence with those states was normal. The attitude of the United States early in 1916 may be seen from the detailed statement sent by the Secretary of State to the American Ambassador in Great Britain, January 4, 1916:

Department advised that British customs authorities removed from Danish steamer *Oscar Second* 734 bags parcel mail en route from United States to Norway, Sweden, and Denmark; that British port authorities have removed from Swedish steamer *Stockholm* 58 bags parcel mail en route Gothenburg, Sweden, to New York; that 5,000 packages of merchandise, American property, have been seized by British authorities on the Danish steamer *United States* on her last trip to the United States; that customs authorities at Kirkwall, on December 18, seized 597 bags of parcel mail from steamer *Frederich VIII* manifested for Norway, Sweden, and Denmark. Other similar cases might be mentioned, such as that of the steamer *Heligolav.* Department inclined to regard parcel-post articles as subject to same treatment as articles sent as express or freight in respect to belligerent search, seizure, and condemnation. On the other hand, parcel-post articles are entitled to the usual exemptions of neutral trade, and the protests of the Government of the United States in regard to what constitutes the unlawful bringing in of ships for search in port, the illegality of so-called blockade by Great Britain, and the improper assumption of jurisdiction of vessels and cargoes apply to commerce using parcel-post service for the transmission of commodities. Please bring this matter of parcel post formally to the attention of the British Government.

The department is further informed that on December 23, the entire mails, including sealed mails and presumably the American diplomatic and consular pouches, from the United States to the Netherlands, were removed by British authorities from the Dutch steamer *New Amsterdam;* that on December 20 the Dutch vessel *Noorder Dyke* was deprived at the Downs of American mail from the United States to Rotterdam, and that these mails are still held by British authorities. Other similar instances could be mentioned, as the cases of the steamers *Rotterdam* and *Noordam.* The department can not admit the right of British authorities to seize neutral vessels plying directly between American and neutral European ports without touching at British ports, to bring them into port, and, while there, to remove or censor mails carried by them. Modern practice generally recognizes that mails are not to be censored, confiscated, or destroyed on high seas, even when carried by belligerent mail ships. To attain same end by

bringing such mail ships within British jurisdiction for purposes of search and then subjecting them to local regulations allowing censorship of mails can not be justified on the ground of national jurisdiction. In cases where neutral mail ships merely touch at British ports, the department believes that British authorities have no international right to remove the sealed mails or to censor them on board ship. Mails on such ships never rightfully come into the custody of the British mail service, and that service is entirely without responsibility for their transit or safety.

As a result of British action, strong feeling is being aroused in this country on account of the loss of valuable letters, money orders, and drafts, and foreign banks are refusing to cash American drafts owing to the absence of any security that the drafts will travel safely in the mails. Moreover, the detention of diplomatic and consular mail is an aggravating circumstance in a practice which is generally regarded in this country as vexatiously inquisitorial and without compensating military advantage to Great Britain. Please lay this matter immediately before the British Government in a formal and vigorous protest and press for a discontinuance of these unwarranted interferences with inviolable mails. Impress upon Sir Edward Grey the necessity for prompt action in this matter.

LANSING.

Removal of mail.—The taking of mail bound for other ports from neutral vessels entering belligerent ports on regular voyages became a matter of diplomatic exchange of notes. This was also the case in the forcible bringing of vessels with mail on board into belligerent ports. In a memorandum of January 10, 1916, communicated to the British Foreign Office by the American ambassador, the position of the United States, as set forth in the foregoing dispatch of January 4, 1916, was fully made known. (British Parliamentary Papers, Misc. No. 5 [1916] [Cd. 8173] p. 1.)

After a delay of two weeks, the following reply was made:

FOREIGN OFFICE, *January 25, 1916.*

YOUR EXCELLENCY: The communication which Your Excellency was good enough to make on the 10th instant, regarding the seizure of mails from neutral vessels, raises important questions of principle in regard to matters which are determined by the policy jointly decided and acted upon by the allied Governments.

His Majesty's Government are therefore compelled to communicate with their allies before they can send a reply to your memorandum. They are consulting with the French Government in the first instance, and I hope to be in a position before long to state the result of this consultation. (Ibid. p. 2.)

The reply to American communications was in effect made the following April through the French ambassador:

By the Eleventh Hague Convention and for the reasons above mentioned, the signatory powers relinquished the right of thus seizing dispatches and declared all postal correspondence to be inviolable.

This inviolability marks a departure from the common law only as regards "correspondence" that is to say, dispatches or "letters" ("lettres missives"), because, as has been seen, it was thought, rightly or wrongly, that, belligerents having better means of communication by telegraph, postal correspondence was without interest for war purposes. It follows that, on the one hand, the inviolability does not apply to anything sent through the post that is not "correspondence," that is to say "letters" ("lettres missives"); and that, on the other hand, it would be giving to this inviolability a wider application than it actually has if it were held to confer exemption from all examination on articles sent by post, even if they were contraband of war.

In these circumstances the Allied Governments declare:

1. That as regards their right of visit and search, and eventually of detention and seizure, goods sent in the form of postal parcels are not entitled to, and will not receive, other treatment than goods sent in any other way.

2. That the inviolability of postal correspondence, laid down by the Eleventh Hague Convention of 1907, detracts in no way from the right of the Allied Governments to search, and, if necessary, to detain and seize goods concealed in wrappers, envelopes, or letters contained in mail bags.

3. That, faithful to their engagements and duly respecting real "correspondence," the Allied Governments will continue for the present to refrain from capturing at sea and confiscating such correspondence, letters, or dispatches, and that they will insure their being forwarded as rapidly as possible, so soon as their genuine character has been established.

April 3, 1916.

(11 Amer. Jour. Int. Law, Supplement [1916], 405, 409.)

The treatment of mails continued to be a matter for the exchange of notes between the United States and other powers.

The Secretary of State to the British Ambassador

No. 1186.]

DEPARTMENT OF STATE,
Washington, May 24, 1916.

EXCELLENCY: I have the honor to acknowledge receipt of Your Excellency's note of April 3, last * * *.

In reply the Government of the United States desires to state that it does not consider that the Postal Union Convention of 1906 necessarily applies to the interferences by the British and French Governments with the oversea transportation of mails of which the Government of the United States complains. Furthermore, the allied powers appear to have overlooked the admission of the Government of the United States that post parcels may be treated as merchandise subject to the exercise of belligerent rights as recognized by international law. But the Government of the United States does not admit that such parcels are subject to the "exercise of the rights of police supervision, visitation, and eventual seizure which belongs to belligerents as to all cargoes on the high seas," as asserted in the joint note under acknowledgement.

It is noted with satisfaction that the British and French Governments do not claim, and, in the opinion of this Government, properly do not claim, that their so-called "blockade" measures are sufficient grounds upon which to base a right to interfere with all classes of mail matter in transit to or from the Central Powers. On the contrary, their contention appears to be that, as "genuine correspondence" is under conventional stipulation "inviolable," mail matter of other classes is subject to detention and examination. While the Government of the United States agrees that "genuine correspondence" mail is inviolable, it does not admit that belligerents may search other private sea-borne mails for any other purpose than to discover whether they contain articles of enemy ownership carried on belligerent vessels or articles of contraband transmitted under sealed cover as letter mail, though they may intercept at sea all mails coming out of and going into ports of the enemy's coast which are effectively blockaded. The Governments of the United States, Great Britain, and France, however, appear to be in substantial agreement as to principle. The method of applying the principle is the chief cause of difference. (Ibid. 412.)

In reply a joint memorandum of the French and British Governments was sent to the United States on October 12, 1916:

10. As for the practice previously followed by the powers in the time of former wars, no general rule can easily be seen therein prohibiting the belligerents from exercising on the open seas, as to postal correspondence, the right of supervision, surveillance, visitation, and, the case arising, seizure and confiscation, which international law confers upon them in the matter of any freight outside of the territorial waters and jurisdiction of the neutral powers.

* * * * *

12. The report adopted by the conference of The Hague in support of convention 11 leaves little doubt as to the former practice in the matter: "The seizure, opening the bags, examination, confiscation if need be, in all cases delay or even loss, are the fate usually awaiting mail bags carried by sea in time of war." (Second Peace Conference Acts and Documents, vol. 1, p. 266.)

* * * * *

17. The imperial Russian decree of May 13–25, 1877, for the exercise of the right of visit and capture, provides, paragraph 7: "The following acts which are forbidden to neutrals are assimilated contraband of war: The carrying * * * of dispatches and correspondence of the enemy." The Russian imperial decree of September 14, 1904, reproduces the same provision. The procedure followed in regard to the mail steamers, and the prize decisions bear witness that public or private mails found on board neutral vessels were examined, landed, and, when occasion arose, seized.

18. * * * Thus, * * * in July, 1904, the steamer *Calchas* (British), captured by Russian cruisers, had 16 bags of mail * * * seized on board and landed and the prize court of Vladivostok examined their contents, which it was recognized it could lawfully do. (Russian Prize Cases, p. 139.)

19. * * * On the other hand, the Japanese Prize Court rules acknowledged the power of those courts in the examination of prize cases to examine letters and correspondence found on board neutral vessels. (Takahashi, "International Law Applied to Russo-Japanese War," p. 568.)

20. The French practice during the War of 1870 is found outlined in the naval instructions of July 26, 1870, under which official dispatches were on principle assimilated to contraband, and

official or private letters found on board captured vessels were to be sent immediately to the Minister of Marine.

21. During the South African War the British Government was able to limit its intervention in the forwarding of postal correspondence and mails as far as the circumstances of that war allowed, but it did not cease to exercise its supervision of the mails intended for the enemy. (Ibid. pp. 418, 419.)

British-Swedish mails.—On December 18, 1915, in a communication to the British Government, the Swedish minister said:

The Swedish Government have been informed that the authorities at Kirkwall have detained postal parcels inclosed in mail bags addressed to Sweden from the United States, which were taken from the Danish steamship *Hellig Olaf* during her last voyage from New York. In the note which your excellency was good enough to send me on the 15th instant, the Swedish Government were further informed that 58 mail bags containing postal parcels from Sweden for the United States had been taken from the Swedish steamer *Stockholm* and detained at Kirkwall. There is every reason to believe that the majority of the latter parcels contained Christmas presents.

On several occasions, when the British authorities had taken measures against Swedish shipping and commerce which seemed to the Royal Government to constitute a violation of international rules as sanctioned by the law of nations, no measure of reprisals or retortion had been taken. This procedure on the part of the Swedish Government was due to their conviction that His Britannic Majesty's Government would consider it right and equitable to rectify the measures in question.

The seizure of the parcels on the *Hellig Olaf* and the *Stockholm* gives the impression, however, that the British authorities, far from wishing to minimize the difficulties, find pleasure in increasing them.

The Royal Government, while protesting in the most formal manner against the seizure of the parcels in question, have to their great regret felt constrained to direct the Postal Administration in Sweden to detain all goods from or to England sent by the parcels mail in transit through Sweden. This measure will be maintained by the Swedish authorities till the matter is settled in a manner which the Royal Government consider satisfactory, and a guarantee is given against the repetition of an incident of this nature, so contrary to international law. (British Parliamentary Papers, Misc., No. 28 [1916] [Cd. 8322] p. 1.)

The Swedish Government regarded the taking of mails from vessels sailing between neutral ports without justification in international law and in retaliation detained British mail in transit via Sweden to Russia.

Sir Edward Grey, on January 1, 1916, gave a detailed reply to the communication of December 18, 1915:

I have received, and read with considerable surprise, your note of the 18th ultimo respecting the examination by the British authorities of the parcels mail found on board the Danish steamship *Hellig Olaf* and the Swedish steamship *Stockholm*. You inform me that the Swedish Government protest against this interference with the parcels mail between Sweden and the United States, as contrary to international law.

It is difficult to understand this contention. The steamship *Hellig Olaf* was carrying a number of postal parcels as to which there was reason to suspect that some had an enemy destination. The ship was accordingly visited and searched in accordance with the well-known and well-established belligerent right. In order not to delay the ship unnecessarily, the suspected parcels were removed for examination, and the ship itself allowed to proceed. The result of the examination was to show that one-third of the parcels contained absolute contraband destined for Germany. These will be put into the prize court. The remainder of the parcels have been forwarded to their addresses. In the same way the steamship *Stockholm* was visited and searched. Suspected parcels were removed, and the ship sent on. In this case the parcels turned out to be unobjectionable from a belligerent point of view, and they too have been dispatched to their destinations.

These are the plain facts of the incidents, and His Majesty's Government is at a loss to imagine what is the breach of international law suggested by the Swedish Government. It can not surely be intended to dispute that a belligerent has a right to visit and search a neutral ship and cargo where he suspects an invasion of his belligerent rights. The Swedish Government are far too familiar with international law to raise such a contention as that. Still less can it be supposed that the Swedish Government desire to throw doubt on the legality of seizure by a belligerent of contraband destined for an enemy country. Is it then suggested that the fact that the goods in question were being transmitted by parcels post renders them immune from the operation of belligerent rights? I am unaware of any justification for such a suggestion. On the contrary, when, at the Second Peace Conference, it was agreed by the powers which took part in it, to grant for the first time immunity in certain circumstances to

postal correspondence found upon neutral ships on the high seas, it was expressly declared in the debate which led up to this decision that parcels were "certainly excluded from the privileged treatment accorded to postal correspondence." Indeed, it is obvious that any other decision would have practically destroyed belligerent rights with respect to contraband and blockade. It is further worthy of remark that the right of visit and search, even in the case of letter post, was expressly preserved, and that letters going to and coming from blockaded ports were exempted from the immunity in question.

The Swedish Government is, of course, perfectly cognizant of all these considerations, and I can only suppose that the protest which you have been instructed to make is based on some misapprehension of the facts. That, too, must be the explanation of their otherwise inexplicable and, I must add, indefensible procedure in detaining the British transit mail to Russia. As I understand your note it is not pretended that the Swedish Government has any right to take such action except by way of reprisal or retortion. I must take leave to observe that for a friendly government to proceed to reprisals or retortion without asking for or receiving any explanation of the alleged offense is a somewhat arbitrary procedure. At the least it imposes on the government taking such drastic action the duty of making itself quite sure of its ground. In this case I feel convinced that after due consideration the Swedish Government will recognize that the action of His Majesty's Government has been perfectly correct. His Majesty's Government must therefore request the immediate release of the British mails, and would welcome any explanation which the Swedish Government may wish to offer.

I desire to add that His Majesty's Government much regrets the delay which the exercise of its belligerent rights caused to the innocent parcels post by the steamships *Hellig Olaf* and *Stockholm*, and to express the hope that no serious inconvenience was thereby caused. They have done their utmost to minimize delay and inconvenience. (Ibid. p. 3.)

Lengthy communications between the two governments followed and some of these mentioned "smoldering fires of irritation which may at any moment cause serious difficulties." After many months of correspondence plans were made for the adjustment of difficulties.

The "Simla," 1915.—In the case of the *Simla* in 1915 the British Prize Court was asked to condemn articles sent by parcel post and the British Government main-

tained that these did not fall under article 1 of XI Hague Convention of 1907. The brief judgment of the court was,

> There is no one here to suggest that articles sent by parcel post are inviolable. There is no appearance. I condemn the goods. (1 Brit. & Col. Prize Cases, p. 281.)

The "Tubantia" and others.—In the case of the *Tubantia*, the *Gelria*, and the *Hollandia*, it was proven that rubber was being shipped in considerable quantities by post. In the judgment, the president of the prize court, May, 1916, said:

> These parcels of rubber were consigned as if they were genuine postal correspondence, because, I assume, it was thought that they would be protected by article 1 of the Eleventh Hague Convention, whereby the postal correspondence of neutrals or belligerents—whatever its particular private character—found on board a ship on the high seas is declared to be inviolable. They certainly are not covered by that convention. The attempt to make use of the article as a cloak for parcels of rubber sent by post is dishonest in the extreme; and it shows how little effect is given in time of war to those conventions which have been made in time of peace.
>
> My duty is clear, and that is to condemn these thousands of parcels seized upon these Dutch vessels as contraband goods going to the enemy country. The attorney general has called attention to the necessity of making public the fact that such goods as these are being shipped in large quantities, and, although contraband, are sent in this way from neutral countries to Germany on board neutral ships, as if they were honest postal communications. (*Tubantia, Gelria, Hollandia,* 32 T. L. R., p. 529.)

The "Noordam."—The British Prize Court in 1919 in the case of the *Noordam* considered the matter of inviolability of mails. The question had arisen as to whether bonds and securities in the mails could be seized under the provisions of article 1 of XI Hague Convention of 1907 in regard to the inviolability of postal correspondence. Lord Sterndale, president of the court, said,

> I am not at all satisfied, to begin with, that bonds and securities are correspondence. In some cases I believe the securities were inclosed in an envelope with a letter. In some cases the

evidence shows that they were made up into parcels, and when made up into parcels in that way if they had been sent by parcels post they would be admittedly outside the convention. But it is argued that because people choose to pay the letter postal rate instead of the parcels postal rate, what is sent in that way becomes inviolable. I can not think that it depends on whether the contents go by the letter mail or by the parcel mail. I put some instances that have happened during this war of articles such as rubber, and the solicitor general mentioned some others, such as aluminum, and all kinds of things which have been sent by letter mail. But the answer to that was, "But you do not generally send those by letter post," and correspondence must mean letters and everything ordinarily sent by letter post. I am not at all satisfied that that is right, and I do not know how you would work the convention if you were to adopt that method, because if you did you would have to inquire into every case and into what the habits of people were which induced them to put into letters such articles—which I think it would be impossible to do. ([1919] p. 255.)

When this case was appealed the judicial committee of the privy council, in a judgment delivered by Lord Sumner, May 4, 1920, said:

No doubt these securities were documents found in the mail bags of the mail steamers in question, but it can not be contended that everything found in a mail bag at sea and carried at postal rates or franked by postage stamps is ipso facto "postal correspondence" for the purpose of the convention. These documents, though printed and engraved matter, are not vehicles of information, and the value of their contents does not lie in what they tell the reader. On the contrary, expressed in common form and earmarked by serial letters and numbers or otherwise, they are identical records of proprietary rights in certain loans and shares or in the interest payable thereon, and, by their terms or by mercantile usage applicable to them, are transferable on delivery. To a bona fide buyer the document represents the holder's right to a portion of the loan or the share capital as the case may be. They are commonly dealt in; they are a convenient form in which to transfer wealth from one country to another, and they require no separate assignment nor the execution of any instrument of transfer. If, therefore, any incorporeal rights can be assimilated to goods and merchandise, they must be such rights as these documents represent. If any document can stand outside the description "postal correspondence," it must be such a document as these. The occasion is not opportune for an attempt to define the word

"correspondence" as used in the convention, but their lordships are satisfied that none of these securities come within it. ([1920] A. C. 904.)

Résumé.—It is evident from official statements, discussions, and judicial opinions that parcel post is not entitled to any special exceptions during war. If goods are sent under seal as first-class mail, these goods do not thereby become correspondence. The treatment of mails and mail vessels was gradually becoming more liberal in the latter part of the nineteenth century. The World War conditions put to severe tests the provisions of the Eleventh Hague Convention so far as it related to mails, and the practices of the belligerents frequently created friction without bringing any adequate military advantages. The carriage of mails from a neutral state in the neighborhood of a belligerent to another neutral state remote from the theater of war should not be interfered with without special reasons. The belligerent should not be obliged to submit to risks because a person uses first-class mail rather than other means of transportation and articles which would, if otherwise transported, be contraband do not change in character as regards belligerent rights because included in pouches of first-class mail. Of course the recognizable official mail of neutrals is exempt and the neutral may properly be requested so to designate official correspondence that it may not be easily mistaken.

During the World War it became evident that the rules for the regulation of the transportation of postal correspondence should be revised in the interest both of neutrals and belligerents.

Treatment of the Gull.—By the statement of the situation, the *Bee* "can not take the *Gull* in nor spare a prize crew to take it in."

The *Gull* is apparently innocent and its papers regular and it is a mail vessel and the search should therefore be carried on with expedition.

Mail pouches may contain postal correspondence, parcel post, or other matter. Of these, postal correspondence

alone is declared to be inviolable though questions have been raised in regard to other postal matter and as to what may properly be included as correspondence.

In article 2 of XI Hague Convention of 1907, it is provided:

> The inviolability of postal correspondence does not exempt a neutral mail ship from the laws and customs of maritime war as to neutral merchant ships in general. The ship, however, must not be searched except in case of necessity, and then with as much consideration and expedition as possible.

If the ship is detained under article 1, the mails are to be forwarded with the least possible delay. Under article 2 the search of the ship is to be "with as much consideration and expedition as possible." Both provisions should be observed as far as possible. Many treaties and some practice favors the delivery of suspected goods on receiving a receipt from the visiting vessel as a means of expediting movements of commerce and avoiding unnecessary delay of vessels. The search in this case is for contraband goods. The obligation rests upon the visiting vessels to forward postal correspondence with the least possible delay. The ends aimed at by XI Hague Convention would therefore be gained as regards the parties concerned by removing the suspected mails to the visiting vessel for search.

SOLUTION

(*a*) The commander of the *Bee* having grounds for suspicion may lawfully search the mails, and if this would cause undue delay, may transfer the mails to the *Bee* for search, in which case he should forward the postal correspondence to its destination as soon as possible.

(*b*) *Aircraft.*—New agencies in war are not entitled to special and exceptional rights because of their weakness, exceptional, or experimental character. Aircraft, like submarines, are vulnerable and vary in character. There are landplanes, hydroplanes, lighter-than-air

craft, etc. Reasoning from analogy, e. g., of maritime craft, may not be sound unless the principles underlying maritime rules are identical. In visit and search at sea, the vessel to be visited must lie-to till the visiting vessel approaches. This may not be possible when a sea vessel summons an aircraft. Even though the same words may be used, their content would not be identical. Rules good for aircraft against aircraft or seacraft against seacraft may not apply in seacraft against aircraft.

The application of rules should be reasonable and the rules should be practicable. That a projectile from a seacraft might by chance bring down an aircraft does not put the aircraft under seacraft rules nor necessarily give the seacraft a right to act on that chance. Force must not be used unnecessarily or in such manner as to involve undue risk to a neutral.

The rules of the Commission of Jurists, drawn up in 1923, have not been and possibly were not expected to be ratified, though they show a reasonable consensus of opinion of the time in regard to the use of aircraft.

While neutral aircraft should not be allowed freedom to aid the enemy, they should not be unduly restricted. Intentional escape or resistance on the part of aircraft when summoned to lie-to by sea craft might involve no greater or even less risk than compliance with the summons.

Attack upon an aircraft without summons would clearly be unjustifiable and make the attacking party liable. The summons must be such as will be evident to the aircraft and this may be difficult to prove. It is evident even from a superficial consideration that the use of aircraft has introduced problems into warfare other than simply a new dimension.

Commission of Jurists, 1923.—The Commission of Jurists in 1923 in their draft of rules of aerial warfare, and not specially contemplating mixed warfare between maritime and aerial craft, after mentioning lack of or falsi-

fication of aircraft markings, arming, entrance to prohibited zones, provided in article 56 that—

In all other cases, the prize court in adjudicating upon any case of capture of an aircraft or its cargo, or of postal correspondence on board an aircraft, shall apply the same rules as would be applied to a merchant vessel or its cargo or to postal correspondence on board a merchant vessel. (1924 Naval War College, Int. Law Documents, p. 149.)

Doctor Spaight on belligerent and neutral aircraft.—Dr. J. M. Spaight, who was of the British delegation of the commission of jurists which drew up rules for aerial warfare and which met at The Hague in 1922–23, has given much attention to this aspect of war. He has pointed out that little precedent exists for determining what law should govern.

The great war is practically devoid of precedents bearing upon the relations of belligerents and neutral aircraft. A few cases did occur in which neutral military aircraft were attacked by belligerent troops or aircraft. * * * But of incidents affecting neutral civil aircraft there appear to have been none. Civil aviation was almost nonexistent in 1914–1918. The belligerent states prohibited all flying other than that carried out by their own or their allies' military machines, and the neutral states had, as a whole, developed aviation to a much smaller extent than the countries which were parties to the conflict. No such international air traffic as that which is now in existence had made its appearance before the end of the war.

* * * Concrete examples being absent, the most convenient text upon which discussion can be based is the tentative legislation contained in the Air Warfare Rules drawn up at The Hague in 1923. These rules include certain articles defining the right of belligerents to interfere with neutral air traffic and to fire upon neutral aircraft. The pertinent articles are as follows:

"ART. 11. Outside the jurisdiction of any state, belligerent or neutral, all aircraft shall have full freedom of passage through the air and of alighting.

"ART. 30. In case a belligerent commanding officer considers that the presence of aircraft is likely to prejudice the success of the operations in which he is engaged at the moment, he may prohibit the passing of neutral aircraft in the immediate vicinity of the forces or may oblige them to follow a particular route. A neutral aircraft which does not conform to such directions, of which it has

had notice issued by the belligerent commanding officer, may be fired upon.

"ART. 35. Neutral aircraft flying within the jurisdiction of a belligerent, and warned of the approach of military aircraft of the opposing belligerent, must make the nearest available landing. Failure to do so exposes them to the risk of being fired upon.

"ART. 50. Belligerent military aircraft have the right to order public nonmilitary and private aircraft to alight in or proceed for visit and search to a suitable locality reasonably accessible.

"Refusal, after warning, to obey such orders to alight or to proceed to such a locality for examination exposes an aircraft to the risk of being fired upon.

"ART. 51. Neutral public nonmilitary aircraft, other than those which are to be treated as private aircraft, are subject only to visit for the purpose of the verification of their papers." (Air Power and War Rights, p. 382.)

Unquestionably some measure of belligerent interference with neutral traffic must be recognized as inevitable and legitimate. Military necessity must take precedence of the right of neutral states and individuals to continue to carry on their air traffic in the theater of war. Generally, apart from liability to capture, neutral aircraft will be subject to the same war risks as belligerent private aircraft, but, because they are neutral, will be entitled to expect from belligerents the maximum assuagement of the rigors of war compatible with military necessities. Those necessities can be pleaded by belligerents as the justification for interference even with neutral public aircraft, but the states to which such aircraft belong will naturally demand that belligerents shall exercise their war rights with due regard to the official character of the aircraft upon which military necessities make it necessary to impose some measure of restraint. Any interference with them is a graver matter than it would be where neutral private aircraft are concerned, and requires a more urgent military necessity to justify it. (Ibid. p. 384.)

Attempts to escape.—Even on the sea an attempt to escape visit and search has not been regarded as resistance. The fleeing vessel is, however, liable to the use of such force as may be necessary to bring it to. A provision to this effect is usually embodied in the regulations of States having navies.

It is evident from the general report of the commission of jurists that they did not intend to identify an attempt to escape with resistance, for in discussing the

liability of neutral private aircraft to capture the commission said of the first ground of liability,

> The first is where it resists the legitimate exercise of belligerent rights. This is in harmony with article 63 of the Declaration of London. As first submitted to the commission, the text included the words "or flees." On due consideration, however, these words were omitted. (1924 Naval War College, Int. Law Documents, p. 142.)

Aerial mail.—The Commission of Jurists at The Hague in 1922–23 gave attention to the carriage of mails on board aircraft but were considering the action of aircraft against aircraft. Article 56 provides:

> A private aircraft captured upon the ground that it has no external marks or is using false marks, or that it is armed in time of war outside the jurisdiction of its own country, is liable to condemnation.
>
> A neutral private aircraft captured upon the ground that it has disregarded the direction of a belligerent commanding officer under article 30 is liable to condemnation, unless it can justify its presence within the prohibited zone.
>
> In all other cases, the prize court in adjudicating upon any case of capture of an aircraft or its cargo, or of postal correspondence on board an aircraft, shall apply the same rules as would be applied to a merchant vessel or its cargo or to postal correspondence on board a merchant vessel. (1924 Naval War College, Int. Law Documents, p. 148.)

General considerations.—In case an aircraft is summoned to stop at sea and obeys, if a heavier-than-air machine, the results may be a crash involving destruction of craft and loss of life of the personnel; if a lighter-than-air craft, the difficulties of visit and approach save in exceptional circumstances would be almost insurmountable. A hydroplane might under favorable circumstances alight. The situation when a sea craft endeavors to visit and search an aircraft is one involving exceptional dangers to the aircraft. Mere suspicion does not justify the subjection of aircraft to undue risk. Craft carrying mails should not be unnecessarily delayed. The mail carrier does not know what are the contents of the mail pouches and is not directly concerned with these contents.

Guilt can not be presumed. Destruction on ground of any act prior to the summons can not easily be justified.

In the report upon article 63 of the Declaration of London, cited also by the commission of jurists in 1923, the comment on maritime warfare is as follows:

> A belligerent cruiser encounters a merchant vessel and summons her to stop in order that it may proceed to visit and search. The vessel summoned does not stop, but tries to avoid visit and search by flight. The cruiser may employ force to stop her, and if the merchant vessel is damaged or sunk, she has no right to complain, since she has acted contrary to an obligation imposed upon her by the law of nations. If the vessel is stopped, and if it is shown that it was only in order to escape the inconvenience of visit and search that she had recourse to flight, and that otherwise she had done nothing contrary to neutrality, she will not be punished for her attempt. If, on the other hand, it is established that the vessel has contraband on board, or that she has in any way whatever violated her neutral obligations, she will suffer the consequences of her infraction of neutrality, but she will not undergo any further punishment for her attempt at flight. Some thought on the contrary that the ship should be punished for an obvious attempt at flight as much as for forcible resistance. It was said that the possibility of condemnation of the escaping vessel would lead the cruiser to spare her so far as possible. But this view did not prevail. (1909 Naval War College, Int. Law Topics, p. 145.)

This report does not admit punishment for attempt at flight, but does assume that the vessel may not complain if injured in consequence. If, however, the alternative to flight should be destruction with loss of life, as would ordinarily be the case if a land plane was forced to stop, the surface vessel could scarcely assume the right to exercise such authority on the mere suspicion of contraband in mail pouches. Indeed, the inability of the surface vessel to carry on war in the air does not confer upon it special rights and it may act only to the degree that commensurate military advantages would result. The bringing down of aircraft because of suspicion as to the contents of their mail pouches would be justified only when the bringing down could be with reasonable safety

to aircraft and personnel. Of this the aircraft would usually be the judge. Protest might be made to the neutral state of the aircraft, but to shoot down neutral aircraft carrying the mail, which carriage does not assimilate the aircraft in any degree to enemy aircraft, would not be justifiable.

The report of the Commission of Jurists of 1923 in regard to aircraft states:

> While aircraft are in flight in the air, the operation of visit and search can not be effected so long as aircraft retain their present form. Article 49, therefore, necessitates the recognition of a right on the part of belligerent military aircraft to order nonmilitary aircraft to alight in order that the right of visit and search may be exercised. They must not only be ordered to alight, but they must be allowed to proceed to a suitable locality for the purpose. It would be a hardship to the neutral if he was obliged to make a long journey for this purpose and the locality must, therefore, not only be suitable, but must be reasonably accessible—that is, reasonably convenient of access. A more precise definition than this can scarcely be given; what is reasonably convenient of access is a question of fact to be determined in each case in the light of the special circumstances which may be present. If no place can be found which is reasonably convenient of access, the aircraft should be allowed to continue its flight. (1924 Naval War College, Int. Law Documents, p. 141.)

SOLUTION

(*b*) The commander of the *Bee* may not take any further action in regard to the neutral aircraft carrying suspected mail pouches.

Situation III

ENEMY PERSONS ON NEUTRAL VESSELS

States X and Y are at war. Other states are neutral. The *Bee*, a vessel of war of state X, meets the *Nemo*, a merchant vessel belonging to a citizen of state N and flying the flag of N, and bound for a port of Y. The *Bee* brings-to the *Nemo* and visits and searches the merchant vessel. The cargo is innocent and the vessel on a regular voyage. There are on board certain passengers.

(*a*) Ten of these passengers are citizens of state Y of the age and capacity that would be called for military service.

(*b*) Ten of the passengers are citizens of neutral states but are well known to have been trained as aviators.

(*c*) Five are women citizens of state Y, but experienced aviators.

(*d*) Ten of the crew of 20 were born in state Y and have previously served in the navy of state Y, though 5 of these are naturalized citizens of N.

The commander of the *Bee* is convinced that the *Nemo* is innocent of carriage of contraband and is not bound for a blockaded port. He can not take the *Nemo* in or spare a prize crew to take it in, but decides to take off the passengers mentioned in (*a*), (*b*), and (c), and 10 members of the crew mentioned in (*d*). State N protests.

What action would be legally correct in each case?

SOLUTION

(*a*) The 10 passengers who are citizens of state Y even though of military age and capacity should not be removed from the *Nemo*.

(*b*) The 10 passengers who are trained neutral aviators should not be removed from the *Nemo*.

(*c*) The 5 women passengers who are citizens of state Y though trained aviators should not be removed from the *Nemo*.

(*d*) The 10 members of the crew should not be removed from the *Nemo*.

NOTES

Treaty provisions.—Many treaties have been negotiated which contain provisions granting immunity to persons of belligerent nationality when found on neutral vessels unless such persons are in the military service of the enemy. Some of these were early treaties before the days of steam navigation and most of such treaties were made during the nineteenth century. The treaties between the United States and Prussia and between the United States and Ecuador embody common provisions:

Prussia—Treaty of Amity and Commerce Concluded September 10 1785

ARTICLE XII

If one of the contracting parties should be engaged in war with any other power, the free intercourse and commerce of the subjects or citizens of the party remaining neuter with the belligerent powers, shall not be interrupted. On the contrary, in that case as in full peace, the vessels of the neutral party may navigate freely to and from the ports and on the coasts of the belligerent parties, free vessels making free ends, in so much, that all things shall be adjudged free which shall be on board any vessel belonging to the neutral party, although such things belong to an enemy of the other; and the same freedom shall be extended to persons who shall be on board a free vessel, although they should be enemies to the other party, unless they be soldiers in actual service of such enemy. (8 U. S. Stat., p. 84., This treaty expired by its own limitations, October, 1796, but Article XII was revived by Article XII of the Treaty of 1828.)

Ecuador—Treaty of Peace, Friendship, Navigation, and Commerce Concluded June 13, 1839

ARTICLE XV

* * * It is also agreed, in like manner, that the same liberty shall be extended to persons who are on board a free ship, with this effect, that, although they may be enemies to both or either party, they are not to be taken out of that free ship, unless they are officers or soldiers, and in the actual service of the enemies: *Provided, however*, and it is hereby agreed, that the stipulations in this article contained, declaring that the flag shall cover the property, shall be understood as applying to those powers only, who recognize this principle; but, if either of the two contracting parties shall be at war with a third, and the other neutral, the flag of the neutral shall cover the property of enemies whose governments acknowledge this principle, and not of others. (8 U. S. Stat., p. 534. This treaty was terminated August 25, 1892, by notice from the Ecuadoran Government.)

Such treaties concluded for nearly 100 years seem to indicate that in the absence of an agreement persons of belligerent nationality might be removed from a neutral vessel. The treaties also show a growing tendency toward the general recognition of the exemption from capture of nonmilitary persons of belligerent nationality where they travel on neutral vessels.

In these treaties the persons liable to capture when on neutral vessels are usually limited to "officers and soldiers and in the actual service of the enemy." In recent years there has been a tendency to query as to whether other persons than officers and soldiers may be liable to capture. In 1807 in the case of the *Orozembo*, Sir W. Scott said:

> To send out one veteran general of France to take the command of the forces at Batavia, might be a much more noxious act than the conveyance of a whole regiment. (6 C. Robinson, Reports, 430.)

The *Orozembo* was, however, regarded as in the military service of the enemy and not merely engaged in regular passenger transportation.

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Numerous treaties refer to officers and soldiers in the service of the enemy. Some writers assimilate to these any persons actually in the military service even though not enrolled, but maintain that these must be distinguished from persons traveling as passengers, without manifest evidence that they are connected with the military service.

Toward the end of the nineteenth century the carriage of enemy military persons received more attention. The *Trent* case had disposed of claims to take from neutral vessels nonmilitary persons. Exactly what constituted military service was not always easy to determine.

Dana's opinion, 1866.—Dana in a long note to Wheaton's International Law gives in 1866 the opinion of the time in regard to persons on neutral vessels.

The right of a belligerent to take noxious persons from an innocent neutral vessel.—Although the United States disclaim such a right, and the demand by Great Britain clearly renounced any such claim, the subject requires separate consideration. It does not raise a question of capturing the vessel for a violation of neutrality, but a right of the belligerent to take off such persons for his own benefit, without reference to the quality of the neutral's act, as being done intentionally, or in justifiable ignorance of the character of his passengers. Nor does it involve the right, once asserted by Great Britain, to take her own seamen from a neutral vessel; for that is not a belligerent right, but an exercise of police power for municipal purposes. The doubt on the question propounded arises chiefly from the fact that great numbers of treaties have provided that the persons of enemies shall not be taken from free ships, unless they be military men in the actual service of the enemy; seeming to imply, not only that the latter may be so taken, but also that, without this provision, any enemy could be so taken, whether a military man or not. The first trace of this provision is in a treaty of commerce between the Netherlands and Sweden of 1675. In a clause of that treaty, which secures freedom to carry enemy goods not contraband in neutral vessels, is the further provision that either party to the treaty may carry in their vessels the subjects of an enemy of the other party, and that they shall not be taken or forced therefrom unless they be military commanders or officials—"nec eos inde evelli aut auferri licebit, exceptis tantum ducibus sive officialibus hostilibus." (Dumont, Corps Dipl. vii 316.) It next appears in the treaty of

Nemeguen in 1678, at the end of article 22—"And, as it has been provided above that a free ship shall be free to carry her cargo, it is further agreed that this liberty shall extend also to persons who shall be found in a free ship, to the effect that although they be enemies of one or the other of the contracting parties, yet, when in a neutral vessel, they shall not be taken therefrom, provided they be not military persons, and effective in the service of the enemy." This clause was copied into the treaty between Sweden and Holland of the next year; into the commercial treaty of Ryswick of 1697; into the treaties of Utrecht of 1713, between France and the Netherlands, and France and England; and into the treaty of 1739 between France and the United Provinces. The only change is, that "actuellement au service desdits ennemis" is substituted for "effectivement en service, etc." This clause is also in the treaty between France and Hamburg of 1769.

This provision afterwards appears in the conventions between France and the United States of 1778 and 1800, between the United States and Holland in 1782, between the United States and Sweden in 1783 and 1816, the United States and Prussia of 1785; the treaty between France and England of 1786, and between the United States and Spain of 1795 and 1819, and in the treaties of the United States with Colombia in 1824, Central America in 1825, Brazil in 1828, Mexico in 1831, Chili in 1832, Peru in 1851, Venezuela in 1836, and, in fact, with nearly if not all the South American States. In the French and English treaty of 1786 is added, after the words "actuellement au service desdits ennemis," the words, "et se transportant pour être employés comme militaires dans leurs flottes ou dans leurs armées"; and in the treaty between France and Hamburg of 1769, after the words "au service des ennemis," is added, "auquel cas, ils seront faits prisonniers de guerre." The clause does not exist in any form in any treaty between Great Britain and the United States. (D'Hauterive et de Cussy, tom. ii. 91, 104, 270; tom. iii. 445. Dumont, vii. i. 366, 440; ii. 389. United States Laws and Treaties, viii. passim.)

Upon the effect of these treaties, Professor Bernard (case of the *Trent*, 14–20) has presented important considerations. He argues that if this clause had appeared first in the nineteenth century, the inference would be that, at that time, the right to take the persons of enemies, not being soldiers, in actual service, was, at least, so far matter of doubt as to require or justify its exclusion in terms; but that, as it had its origin some 200 years ago—when the authority and necessity of prize adjudications were not so well settled and understood as now, and the claims of belligerents to interdict neutral intercourse with their enemies, and

neutral carrying-trade of persons and goods, were almost unlimited, and their practice loose and irregular, and their rights but little settled, and when the precaution was reasonable—the fact that the clause has been copied out in later treaties, or rather not omitted, does not require the admission that the clause is now necessary, and that the law of nations would permit non-military persons to be so taken, as the law is now understood and acted upon between nations not parties to a treaty having such a preventive clause.

The question remains, How does the existence and history of this clause bear upon military persons in actual service found in neutral vessels?

It can not be doubted, that, as between nations parties to such a treaty, it is admitted that a class of hostile persons, of a defined character and in a defined predicament, may be "taken out"—"enlevés" "tirés" "avelli aut auferri"—from the neutral vessel. If nations have seen fit to continue these treaties, they must be held to intend the same meaning, and though, where doubtful, to be always construed in favor of liberty of persons and of neutrals, yet to be fairly construed toward the party involved in war. M. Hautefeuille, in his pamphlet on the *Trent* case, admits by implication, that, if Messrs. Mason and Slidell had been military persons, and so in actual service as to come within the terms of this clause, they could have been taken from the *Trent*, although the United States and Great Britain were not parties to such a treaty; for he considers, as M. Thouvenel in his letter to M. Mercier of December 3, 1862, seems also to consider, that these treaties explain and exhibit the international law. *A fortiori*, these distinguished writers would admit the legality of the act between parties to such a treaty. (See also Hautefeuille, des Nat. Neutr. ii. 181.) The existence of this clause in treaties, at this time, is certainly an anomaly. It doubtless arose from the fact, that, when the clause was first used, 200 years ago, and for some time afterwards, it was a common practice to take contraband goods from vessels without carrying the vessels in for adjudication * * *.

How do the history and existence of this clause affect nations which have no such treaty between them? In view of the settled policy of nations to prohibit all acts of force on neutral vessels done at the discretion of the belligerent officer, and which look to no subsequent judicial determination, it may be safely predicted, that, if such a case should arise, it would be held that the law of nations could not be kept anchored to treaty provisions made two centuries ago, as protections against acts not then necessarily considered legal, but only probable or possible, so long

as any nations should choose to repeat the clause ex majore cautelâ in their later treaties; and that the modern policy of nations does not sanction such an act.

Mr. Madison, Secretary of State, in his dispatch to Mr. Monroe, at London, of January 5, 1804, on the subject of impressment of our seamen, speaking of the French treaty of 1800, says, "The article renounces the claim to take from the vessels of the neutral, on the high seas, any person whatever not in the military service of an enemy; an exception which we admit to come within the law of nations on the subject of contraband of war. With these exceptions, we consider a neutral flag on the high seas as a safeguard to those sailing under it. * * * Nowhere will she [Great Britain] find an exception to the freedom of the seas, and of neutral flags, which justifies the taking away of any person, not an enemy in military service, found on board a neutral vessel. * * * Whenever a belligerent claim against persons on board a neutral vessel is referred to in treaties, enemies in military service alone are excepted from the general immunity of persons in that situation. And this exception confirms the immunity of those who are not included in it." (Wheaton, International Law (Dana), 8th ed. p. 656 n.)

The question did not again give rise to much discussion until the Chino-Japanese War.

The "Sidney", 1894.—During the Chino-Japanese War in 1894, two men claiming American citizenship and traveling under the names of Howie and Brown were taken from the French passenger steamer *Sidney* at Kobe, November 4, 1894, while en route for Hong Kong. No question was raised to the right of Japanese authorities to search the *Sidney*. Howie and Brown were supposed to have contracted with the Chinese Government to employ an invention which they possessed and claimed would destroy the Japanese fleets. Controversy immediately arose as to the right of the Japanese authorities to remove Howie and Brown from a neutral vessel. It would seem that neutrals under contract to engage in and en route for the purpose of engaging in hostile service, could properly be seized, even when on a neutral vessel.

Institute of International Law resolutions.—The Institute of International Law had for some years had before it propositions in regard to traffic forbidden to neutrals.

The propositions were discussed at the Venice session in 1896, and in the regulation on contraband of war under transport service it was provided:

SEC. 7. The transportation of an enemy's troops, soldiers, or agents of war is forbidden: (1) In belligerent waters; (2) between their authorities, ports, possession, armies, or fleets; (3) when the transportation is on account of or by order or mandate of an enemy, or to bring him either agents with a commission for war operations, or soldiers already in his service or auxiliary troops or those recruited in violation of neutrality—between neutral ports, between those of a neutral and those of a belligerent, from a neutral point to the army or the fleet of a belligerent.

The prohibition shall not extend to the transportation of individuals who are not yet in the military service of a belligerent, even though they have the intention of entering it, or those who make the journey as simple travelers without evident connection with military service. (Resolutions of the Institute of International Law, Scott, p. 130.)

South African War cases, 1900.—Somewhat strained relations between Great Britain and Germany were created in 1900 in consequence of visit and search of certain German vessels on suspicion of carriage of contraband to South Africa. The German authorities objected to delay in port of vessels in order to search a mail steamer. The German ambassador in a communication to the Marquess of Salisbury, January 5, 1900, said,

According to a communication received by the Imperial Government by telegraph from Aden the day before yesterday, a second mail steamer of the German East African line, the "General," has now been stopped there, occupied by force by British troops, and ordered to land her cargo.

In accordance with instructions received, I have the honor to inform your Excellency of the above, and, expressly reserving any claims for compensation, to request that orders may be given for the immediate release of the steamer and her cargo, for that portion of her cargo which has already been landed to be taken on board again, and for no hindrances to be placed in the way of the ship continuing her voyage to the places mentioned in her itinerary.

I am further instructed to request your Excellency to cause explicit instructions to be sent to the Commanders of British ships in African waters to respect the rules of international law,

and to place no further impediments in the way of the trade between neutrals.

I should be obliged if your Excellency would sent me a reply at your earliest convenience. (Parliamentary Papers, Africa No. 1 [1900] Cd. 33, p. 8.)

On January 17, 1900, the Marquess of Salisbury wrote to the British ambassador at Berlin:

I received with some surprise a communication from the representative of a power with whom Her Majesty's Government believe themselves to be on the most friendly terms—worded in so abrupt a manner, and couched in language which imputed to Her Majesty's naval commanders that they had shown a disrespect to international law, and placed unnecessary impediments in the way of neutral commerce. There is no foundation for these imputations.

I at once requested the lords commissioners of the admiralty and the Secretary of State for India to make inquiries whether the facts were as reported to the German Government.

From reports which have reached Her Majesty's Government by telegraph the following appear to be the facts of the case.

Before the arrival of the vessel at Aden it was already known that she had on board among her passengers 31 men of German and Flemish nationality who had all the appearance of their being on their way to the South African Republics for the purposes of military service there. On her arrival, information reached the British resident that there were various suspicious articles on board destined for Delagoa Bay, and that boxes of ammunition were buried under the reserve store of coal. The senior naval officer at Aden thereupon boarded her on the ground of strong suspicion of her carrying contraband of war destined for the enemy and commenced to search her. * * *

There seems reason to believe that among the passengers on board going to the Transvaal were a number of trained artillerymen, but there was no sufficient evidence as to their destination to justify further action on the part of the officers conducting the search. (Ibid. p. 21.)

In a speech in the Reichstag on January 19, 1900, Count von Bülow said:

4. By the terms "contraband of war" only such articles or persons are to be understood as are suited for war, and at the same time are destined for one of the belligerents. The class of articles to be included in this definition is a matter of dispute, and, with the exception of arms and ammunition, is determined,

as a rule, with reference to the special circumstances of each case, unless one of the belligerents has expressly notified to the neutrals in a regular manner, what articles it intends to treat as contraband, and has met with no opposition. (Ibid. p. 24.)

Analogues of contraband.—Misconceptions had arisen from an attempt to extend an accepted category of acts such as the carriage of contraband to the carriage of persons. This seems to have been in Mr. Blaine's mind when in 1890 he wrote:

> Many writers on international law assimilate the carrying of military persons in the service of a belligerent to the carrying of contraband goods. But, in order that the question of "contraband of war" may arise, both as to the vessel and the person carried, three things are essential. In the first place, there must be an actual state of war. * * * In the second place, in order that the vessel may be condemned for carrying contraband, it must be shown that she knowingly carried it in such a way as to make it clear that it was her intention to take part in the war. In the third place, in order that the person may be treated as contraband, it must appear that he is in the service of the enemy. This requirement is found in many of our treaties and was embodied in article 14 of the extinct treaty of 1849 between the United States and Guatemala, by which it was strictly provided that persons on board of the ships of the contracting parties in time of war should not be taken out unless they were "officers or soldiers and in the actual service of the enemies." (Mr. Blaine to Mr. Mizner. 1890 For. Rel., p. 129.)

It is true that there might be a remote analogy but Professor Westlake has indicated the difference:

> * * * Men present no real analogy to contraband, although they as well as dispatches are often spoken of as its analogues. Men can not be forwarded like goods, in pursuance of an intention formed about them by some one else. All that can be done is to give them facilities for locomotion, and the question is what facilties of the kind the customary law of nations does not allow a neutral to afford. Accordingly, the carriage of men has not been usually coupled in treaties with the carriage of contraband but with the clauses stipulating the rule "free ships free goods," in which it is common to find it laid down that the freedom of the flag covers all persons on board except those in the enemy's military service. And by the resolutions of the Institute of International Law on "transport service," which it passed at the same

time as those on contraband, the only persons whom it is for bidden to neutrals to carry are those in a belligerent's military service and his diplomatists credited to his ally. The British Admiralty Manual includes in the prohibition "civil officials sent out on the public service and at the public expense. * * * When the persons travel as regular passengers in the ordinary course, it must be remembered that the customary right to capture even military officers has not been accompanied by any relaxation of the duty to send every neutral ship that is interfered with in for adjudication, and that to arrest a passenger liner and send her in for adjudication would be an intolerable nuisance. The duty referred to can not properly be relaxed, for those who capture the men can not be allowed to be judges in their own cause, and an adjudication on the ship is the only means of submitting their act to legal decision." (2 Westlake, International Law, 2d ed., p. 302.)

Declaration of London.—The changes in recent years in the methods of transportation and of communication made necessary the consideration of the advisability of requiring a vessel to be brought into port before enemy persons could be removed. The early practice of impressment had created a strong prejudice against removal of anyone at sea, but the feeling that states could be trusted not to abuse the privilege if permitted to remove enemy military persons gradually tended toward a changed attitude. The manifest disadvantages of a rule that would require a large neutral ocean liner to be brought to a belligerent port because there was on board, or because there was good ground to believe there was on board, a belligerent military person became evident. In the report of the British delegation to the International Naval Conference, it was stated in 1909:

21. We had, however, to take account of the consideration, set forth in paragraph 36 of our instructions, in favor of an arrangement being made whereby, in certain circumstances, large passenger steamers under a neutral flag should, if possible, be freed from the costly inconvenience of being taken into a prize court and there detained, perhaps for a prolonged period, merely because a few individuals forming a part of the armed forces of a belligerent, but whose military status was unsuspected by the owners or captain of the vessel, were among her passengers.

On a careful review of the question in all its bearings, we came to the conclusion, shared by all the other members of the conference, that, on the whole, the interests of neutrals, and particularly of those powers which possess a numerous fleet of ocean liners regularly engaged in passenger traffic, would best be served by allowing a belligerent to remove from a neutral ship, and make prisoners of war, any persons found on board that are actually embodied in the armed forces of the enemy. (International Naval Conference held in London, December, 1908–February, 1909. British Parl. Pap. 1909, Vol. LIV, Misc. No. 4. [Cd. 4554.])

The International Naval Conference at London, 1909, also gave detailed consideration to the matter of what might constitute a military person. In discussion it was said:

Sur la question de la définition des "passagers individuels" visés par le 2°, on explique qu'il faut considérer comme rentrant dans cette catégorie des personnes enrôlées dans les cadres de l'armée et soumises aux lois et à la discipline militaires, mais non des recrues et des réservistes en route pour leur pays pour remplir leurs devoirs militaires. Cette définition parait justifiée parce qu'il est impossible de regarder des individus qui ne sont pas soumis aux lois de la guerre comme faisant déjà partie de l'armée ennemie et comme susceptibles, en conséquence, d'être faits prisonniers de guerre. Si l'on voulait aller plus loin et soumettre au droit de la contrabande par analogie toutes les personnes obligées à faire un service militaire d'après la loi de leur pays, on empêcherait presque tout sujet mâle d'un État où le service militaire est obligatoire, de faire des voyages à bord de navires neutres, et l'on aurait ainsi l'air de vouloir légaliser des mesures vexatoires contre ces navires, résultat qui ne répondrait assurement pas aux intentions de la Conférence. L'intention de cette disposition est, en somme, d'assimiler la solution de cette question à celle que reçoit la question analogue dans la guerre sur terre, où le belligérent envahissant un territoire ennemi n'a pas le droit de faire prisonniers les jeunes gens qui pourraient être appelés sous les drapeaux en qualité soit de recrues soit de réservistes, mais bien les seules personnes qui portent déjà les armes." (Parliamentary Papers, Misc. No. 5 [1905] Cd. 4555, p. 192.)

When the report of the committee which had been intrusted with the presenting of rules upon unneutral service was presented to the conference, it contained the following:

Des individus incorporés dans les forces armées de terre ou de mer d'un belligérant peuvent se trouver à bord d'un navire de commerce neutre visité. Si le navire est sujet à confiscation, le croiseur le saisira et le conduira dans un de ses ports avec les personnes qui se trouvent à bord. Évidemment les militaires ou marins de l'État ennemi ne seront pas laissés libres, mais seront considérés comme prisonniers de guerre. Il peut arriver que l'on ne soit pas dans le cas de saisir le navire—par example, parce que le capitaine ne connaissait pas la qualité d'un individu qui s'était présenté comme un simple passager. Faut-il alors laisser libre le ou les militaires qui sont sur le navire? Cela n'a pas paru admissible. Le croiseur belligérant ne peut être contraint de laisser libres des ennemis actifs qui sont matériellement en son pouvoir et qui sont plus dangereux que tels et tels articles de contrebande; naturellement il doit agir avec une grande discrétion, et c'est sous sa responsabilité qu'il exige la remise de ces individus, mais son droit existe. Aussi a-t-il été jugé nécessaire de s'expliquer sur ce point. On peut, du reste. consulter l'Article 12 de la Convention du 18 octobre, 1907, sur l'adaptation à la guerre maritime des principes de la Convention de Genève. D'après cet article, "tout vaisseau de guerre d'une partie belligérante peut réclamer la remise des blessés, malades, ou naufragés qui sont à bord de bâtiments-hopitaux militaires, de bâtiments hospitaliers de sociétés de secours ou de particuliers, de navires de commerce, yachts et embarcations, quelle que soit la nationalité de ces bâtiments." Si un navire de guerre belligérant peut réclamer à un navire de commerce neutre la remise d'un ennemi blessé ou malade. on ne voit pas pourquoi il ne pourrait réclamer la remise d'un homme valide. Il n'est pas inutile d'adjouter que tous les États représentés à la Conférence Navale ont signé sans réserves la Convention de 1907. (Ibid. p. 321.)

The rule as finally adopted in article 47 reads—

Any individual embodied in the armed force of the enemy, and who is found on board a neutral merchant vessel, may be made a prisoner of war, even though there be no ground for the capture of the vessel. (1909, Naval War College, Int. Law Topics, p. 111.)

Upon this article the general report comments as follows:

Individuals embodied in the armed military or naval forces of a belligerent may be on board a neutral merchant vessel which is visited and searched. If the vessel is subject to condemnation, the cruiser will capture her and take her to one of her own ports with the persons on board. Clearly, the soldiers or sailors of the

enemy state will not be set free, but will be considered as prisoners of war. It may happen that the case will not be one for the capture of the ship—for instance, because the master does not known the status of an individual who had the appearance of an ordinary passenger. Must the soldier or soldiers on board the vessel be set free? That does not appear admissible. The belligerent cruiser can not be compelled to set free active enemies who are physically in her power and are more dangerous than this or that contraband article; naturally, she must act with great discretion, and it is at her own responsibility that she requires the surrender of these individuals, but the right to do so is hers; it has thus been thought necessary to explain the point. (Ibid.)

Regulations.—Several states have issued regulations which provided for the treatment of enemy persons found on neutral vessels. It was common in early regulations to attribute to some of these persons something of the character of contraband or to class those in the military service as contraband. The British Manual of Naval Prize Law, prepared by Godfrey Lushington and issued in 1866 after the *Trent* affair, contained the following articles:

190. The following persons on board a neutral vessel, which has a hostile destination, are contraband:

(1) Soldiers or sailors in the service of the enemy.

(2) Officers, whether military or civil, sent out on public service of the enemy at the public expense of the enemy. The number of such officers is immaterial.

195. The commander will not be justified in taking out of a vessel any contraband persons he may have found on board, and then allowing the vessel to proceed; his duty is to detain the vessel and send her in for adjudication, together with the contraband persons on board.

Prof. T. E. Holland prepared the manual issued in 1888 which contained a similar provision in regard to removal of persons.

94. The commander will not be justified in taking out of a vessel any enemy person he may have found on board, and then allowing the vessel to proceed; his duty is to detain the vessel and send her in for adjudication, together with the persons on board.

The regulations issued by other states during the early twentieth century were in accord with the principles stated in the British Manual of Naval Prize Law.

Chinese regulations, 1917:

44. Hostile persons are liable to capture as prisoners of war. Vessels carrying hostile persons and the cargo belonging to the owner of the vessel are liable to condemnation, unless proofs are given to show that the ship had no knowledge of the passengers of enemy character. (1915 Naval War College, Int. Law Documents, p. 176.)

German ordinance, 1909:

53. Every person enrolled in the forces of the enemy who is found on board a merchant ship may be made a prisoner of war, even when the ship herself is not liable to capture. (Ibid. p. 177.)

Italian prize regulations, 1915:

8. Persons belonging to or intending to join the enemy's armed forces found on board a neutral vessel may be made prisoners of war, even though the ship be not subject to capture. (Ibid. p. 177.)

This provision has been continued in Art. 78, p. 36, Norme di Diritto Marittimo di Guerra, Roma, 1927.

Russian regulations, 1916:

Par. 3. Anyone, forming part of the armed forces of the enemy and found on a neutral vessel (merchant) may be taken war prisoner, even if there is no reason for seizing the vessel. (Ibid. p. 177.)

Japanese regulations, 1914:

Art. 82. Any individual embodied in the armed force of the enemy, and who is found on board a neutral merchant vessel, may be made a prisoner of war, even though there be no ground for the capture of the vessel.

Art. 83. In the case of the preceding article, the boarding officer, by order of the commanding officer of the man-of-war, may request the master of the vessel to deliver such individuals. If the master refuses to deliver them, the boarding officer shall seize such individuals and, if the crew of the vessel resist, shall capture the vessel.

Art. 84. In the case of the preceding article, the boarding officer shall prepare a document in duplicate regarding the delivery

according to Form No. 7 and shall give one copy to the master of the vessel.

ART. 85. In case the master of the vessel objects to the delivery of individuals specified in article 82, the commanding officer of the man-of-war shall immediately report to the Minister of the Navy the gist of the objection and the measures he has taken. (Ibid. p. 177.)

The German Prize Code, 1915, provided—

49. Reservists, recruits, and volunteers on the way to their place of muster are not to be regarded as "persons embodied in the armed forces of the enemy."

The Instructions for the Navy of the United States, June, 1917, were:

89. As to treatment of vessels outside of neutral jurisdiction and carrying persons embodied in the military service of the enemy * * *.

90. The persons referred to in paragraph 89 must be actually embodied in the military service of the enemy. Reservists or other persons subject to military duty but not formally incorporated in military service are not included.

French interpretation.—The French Prize Court in 1916, considering that the decree of August 25, 1914, had made the Declaration of London of February 26, 1909, effective except for certain modifications particularly relating to contraband, gave a somewhat extended interpretation to article 45. The fact that the passengers, might from their age be incorporated into the forces of the enemy was regarded as sufficient ground to declare the vessel specially carrying them as good prize.

Considérant que, aux termes de l'article 45 de la Déclaration de Londres, un navire neutre est confisqué lorsqu'il voyage spécialement en vue du transport de passagers individuels incorporés dans la force armée ennemie;

Considérant qu'il résulte de l'instruction que le vapeur *Federico* n'est pas un paquebot faisant régulièrement le transport des voyageurs; que, lorsqu'il a été capturé en mer, il voyageait specialement en vue du transport, de Barcelone à Gênes, de nombreux passagers allemands et austro-hongrois, dont la grande majorité appartenaient par leur âge aux classes mobilisées par leurs gouvernements respectifs et voyageaient pour répondre à cet appel; que, dans ces circonstances, ces passagers devaient être regardés

comme incorporés au sens de l'article 45 précité, et qu'ainsi la navire était, aux termes dudit article, passible de confiscation.

Décidé:

La prise du vapeur espagnol *Federico*, y comprise les agrès, apparaux et accessoires, est déclaré bonne et valable pour la valeur nette en être adjugée aux ayants droit, conformément aux lois et règlements en vigueur. (1 Décisions du Conseil des Prises, 1916, p. 162.)

French Regulations, 1916.—59. Alors même qu'il n'y aurait pas lieu de capturer le navire, vous pourrez faire prisonniers de guerre tous individus en route vers les pays ennemis pour y prendre les armes. * * * (Instructions sur l'Application du Droit International en Cas de Guerre, Paris, 1916. Furnished on request to French Navy Department in 1928 for latest international law instructions.)

Early World War practice.—The taking of persons of belligerent nationality from neutral vessels early in the World War became a matter of difference of opinion.

The American Ambassador in Berlin in a dispatch of August 28, 1914, informs the Department of State that the German Foreign Office had made known to him that England and France were not observing the Declaration of London. (For. Rel., U. S., 1914, Sup. 221.)

3. The British and French naval forces are taking away Germans of military age, but not embodied in the German armed forces, as prisoners of war from neutral ships, in contravention of the principles laid down in article 45, No. 2, and article 47 of the Declaration of London. Thus the British naval forces have taken away Germans liable to military duty from the Dutch ships *Tubantia* at Plymouth and *Potsdam* at Falmouth, from the Italian ships *Revittorio* and *Ancona* at Gibraltar, and from the Norwegian steamer *Norwega* in Bergen. French naval forces have taken like measures against the Spanish steamer *Sister* at Marseilles. In all these cases the hostile armed forces have acted contrary to the provisions of the Declaration of London; for, as the general report of the editing committee expressly states in the first paragraph of the remarks to article 45, the whole conference was agreed for juridical as well as practical reasons that solely active military persons are liable to capture at sea, and not persons returning to their native country in order to fulfill their general military duty.

In view of this state of affairs the German Government has a very considerable interest in learning without delay whether Great Britain, France, and Russia are going to consider them-

selves bound by the provisions of the Declaration of London. Should this be the case the British Government would have to give back immediately the German goods seized on neutral ships, and the British and French Governments would have to set at liberty the Germans arrested on neutral ships. In the contrary case the German Government would have to reserve the right to disregard in the future for its part also provisions of the Declaration of London not in harmony with Germany's military interests. It would accordingly be gratified if the Government of the United States would cause the other belligerents to declare their attitude toward the Declaration of London immediately.

In addition the German Government would be interested in learning what position the American Government now takes with regard to the Declaration of London, in particular whether it proposes to acquiesce in violations of its provisions by the naval forces of Great Britain, France, or Russia. (Ibid. p. 225.)

The practice as to permitting reservists to pass through the territory of the United States was particularly a matter of concern to Great Britain and France and there was considerable correspondence between various governments relating to this subject beginning as early as August 12, 1914. The circular note from the Acting Secretary of State was sent to the diplomatic representatives of the belligerent States.

DEPARTMENT OF STATE,
Washington, October 3, 1914.

EXCELLENCY: A number of requests in specific cases have been made of the department for permission for nationals of belligerent countries to come to the United States from Canada for the purpose of embarking to the countries of which they are citizens or subjects. The requests were granted, as neither the neutrality laws of the United States nor the proclamation of the President prohibit passage through the United States of reservists who are returning to their respective countries for the purpose of engaging in military service: *Provided*, Their transit does not amount to the beginning or setting on foot, or providing or preparing the means for, any military expedition or enterprise to be carried on from the territory or jurisdiction of the United States.

The Department of State and the Department of Labor, after consideration of the subject, have reached the conclusion that embarrassment and criticism would be obviated by the issuance of general instructions to the United States immigration officials to permit the transit of reservists of belligerent nationalities who

desire to take ship for their countries at ports in the United States, rather than to require each case to be presented separately through diplomatic channels. But, as this course will involve further relaxation of the administration of the immigration laws of the United States, its adoption will depend on the willingness of each of the Governments concerned to give to the Government of the United States an assurance that its male citizens or subjects of military age whenever permitted to enter the United States during the present war will not be allowed to become public charges in this country.

I shall be glad to receive from you such an assurance on the part of your Government.

ROBERT LANSING.

(Ibid. p. 567.)

To this note the British and French Ambassadors replied that their Governments would take measures that persons in transit should not become a public charge. The Austrian, Hungarian, and German Ambassadors found it impracticable to take advantage of the American Government's offer as their enemies were taking "persons liable to military service off neutral vessels."

British notice, 1914.—On November 3, 1914, a British Foreign Office Notice was published in the London Gazette as follows:

In view of the action taken by the German forces in Belgium and France of removing, as prisoners of war, all persons who are liable to military service, His Majesty's Government have given instructions that all enemy reservists on board neutral vessels should be made prisoners of war.

FOREIGN OFFICE,

November 1, 1914. (London Gazette, November 3, 1914.)

This was later referred to as action based on reprisal. It should, however, be made clear that the action of Germany was with reference to an area under German military authority. To assume that such an action was a justifiable ground for taking persons of corresponding capacity from under neutral jurisdiction could with difficulty be maintained and as in the case of the *China* was not maintained.

Piepenbrink case, 1914.—There was a considerable correspondence in regard to a German who had declared his intention to become an American citizen and who was employed upon a vessel registered under the American flag. Various questions were discussed in course of the diplomatic correspondence between the Government of the United States and the Governments of France and Great Britain.

The Secretary of State to Vice Consul Bundy[1]

[Telegram]

DEPARTMENT OF STATE,
Washington, December 7, 1914.

It appears from information received by department that Piepenbrink, waiter or steward on *Windber*, was taken from that American vessel while on the high seas by officers of French cruiser. His arrest and detention are deemed to be without right and you will ask British authorities who now detain him for his release.

BRYAN.

(9 Amer. Jour. Int. Law, Supplement, p. 353.)

The Secretary of State to Ambassador Sharp[2]

[Telegram]

DEPARTMENT OF STATE,
Washington, December 7, 1914.

August Piepenbrink, waiter or steward on American registered steamer *Windber* bound to New York, was taken from that vessel by officers of French cruiser *Conde*, about November 13, while on the high seas some two days out of Colon and 250 miles South of Kingston. Piepenbrink is of German birth, but had regularly filed declaration of intention to become American citizen at Sacramento, Calif., in 1910. He is now detained prisoner at Kingston, Jamaica, in charge of British officials. Action of French cruiser in seizing Piepenbrink is deemed to have been without right, as also his arrest and detention by British authorities. You will ask French Government for orders for his release.

BRYAN.

(Ibid. p. 353.)

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[1] Vice and deputy consul at Kingston, Jamaica.
[2] Similar instruction to embassy at London.

Ambassador W. H. Page to the Secretary of State

[Telegram]

AMERICAN EMBASSY,
London, January 4, 1915.

Your 705, December 7.

British Government answers that although August Piepenbrink has declared intention of becoming American citizen he appears from a legal standpoint to be still a German subject if he has not actually taken out letters of naturalization and that in these circumstances it is not possible for him to be released.

PAGE.

(Ibid. p. 354.)

The Secretary of State to Ambassador W. H. Page

[Telegram]

DEPARTMENT OF STATE,
Washington, March 2, 1915.

Your 1395, January 4, concerning detention of Piepenbrink. It is understood that the only reason assigned by British Government for his detention is that, although he has declared his intention to become an American citizen, he has not actually taken out letters of naturalization and appears from a legal standpoint to be a German subject. In reply to this and supplementing the grounds upon which this Government objects to his detention as set forth in Department's No. 705, December 7, inform British Government that since he declared his intention of becoming American citizen in 1910, Piepenbrink has been employed in the American Merchant Marine, and call attention to section 2174, United States Revised Statutes, which provides that every foreign seaman employed on board American merchant vessels having declared intention of becoming a citizen "shall, for all purposes of protection as an American citizen, be deemed such, after the filing of his declaration of intention to become such citizen." Also point out that independently of any question of Piepenbrink's American citizenship, this Government insists that his removal from an American vessel on the high seas was without legal justification. The facts show that Piepenbrink was not embodied "in the armed forces of the enemy," in the sense of the rule on that subject in the Declaration of London, and apart from the Declaration of London, which this Government does not recognize as in force, there is not justification in international law for the removal of an enemy subject from a neutral vessel on the high seas bound to a neutral port, even if he could properly be regarded

as a military person. The rule was stated for Great Britain by Earl Russell in the *Trent* case (Moore's Digest VII, 772) as follows:

"If the real terminus of the voyage be bona fide in a neutral territory, no English, nor, indeed, as Her Majesty's Government believe, any American authority can be found which has ever given countenance to the doctrine that either men or dispatches can be subject, during such a voyage, and on board such a neutral vessel, to belligerent capture as contraband of war."

For these reasons, which you will urge upon the attention of the British Government, you are instructed to again request that orders be issued for Piepenbrink's immediate release.

BRYAN.

(Ibid. p. 354.)

The Secretary of State to Ambassador Sharp

[Telegram]

DEPARTMENT OF STATE,
Washington, March 2, 1915.

Your 484, January 22. Inform Foreign Office that this Government regards the seizure of Piepenbrink by the French Government and his detention by the British Government as unjustifiable, and has to-day addressed a communication on this subject to the British Government requesting his immediate release and setting forth the grounds of objection to his detention, which apply equally to his seizure, the responsibility for which rests with the French Government. A copy of this communication is appended for the information of the Foreign Office, and its attention should also be called to the rule stated by the French Minister of Foreign Affairs in a note dated December 3, 1861, to the French Minister at Washington, in regard to the *Trent* case, as follows:

[Translation]

"The destination of the *Trent* was not a point belonging to one of the belligerents. She was carrying her cargo and her passengers to a neutral country, and, moreover, she had taken them on in a neutral port. If it were admissible that under such conditions the neutral flag did not completely cover the persons and merchandise which it was transporting, its immunity would not longer be anything but an empty word; at any time the commerce and navigation of third powers would have to suffer from their harmless or even indirect relations with one or the other of the

belligerents; the latter would no longer be entitled merely to require entire impartiality of a neutral and to forbid him from interfering in any way in the hostilities, but they would place upon his freedom of commerce and navigation restrictions the lawfulness of which modern international law has refused to admit. (Calvo, Fifth Edition, V, pp. 94–85.)"

The seizure of Piepenbrink by the French Government was clearly contrary to the rule thus announced by that Government.

The communication to be presented to the British Government is as follows: * * *

[Inserted here is the complete note to Ambassador Page, dated Mar. 2, 1915, above.] (Ibid. p. 355.)

Ambassador Sharp to the Secretary of State

No. 298.] AMERICAN EMBASSY,
Paris, March 12, 1915.

SIR: In acknowledging the receipt of the department's telegraphic instruction No. 600 of the third instant, relative to the seizure on board the American steamer *Windber* of August Piepenbrink, I have the honor to inclose herewith the copy of a note which I handed to Mr. Delcassé, the French Minister for Foreign Affairs, on March 5, in conformity therewith.

At the same time, I stated to Mr. Delcassé that the American Ambassador at London had been instructed to make representations to the British Government, requesting the immediate release of Piepenbrink.

The minister replied that he would give the matter his urgent and early attention, examining the question in the most friendly spirit.

I have, etc. WM. G. SHARP.

(Ibid. p. 357.)

[Inclosure]

Ambassador Sharp to the French Minister for Foreign Affairs

AMERICAN EMBASSY,
Paris, March 5, 1915.

EXCELLENCY: Acting on instructions from my Government, I had the honor to address a note to Your Excellency on December 11, 1914, regarding the seizure by the French cruiser *Condé* of August Piepenbrink, a steward on board the American steamer *Windber* bound from Colon to New York. My Government considering the

removal of this seaman from an American vessel as without right, I was directed to request that orders be given for his release.

On January 14 Your Excellency replied that at the time of his arrest Piepenbrink, having raised no protest nor presented any certificate testifying to his intention of becoming naturalized as an American, had been placed under the custody of the governor of Kingston and that it lay within the province of that official to decide the question of his liberation.

My Government, to whom this response was duly transmitted, again instructs me to inform Your Excellency that it regards the seizure of Piepenbrink by the French Government and his detention by the British Government as unjustified. A communication to this effect has been addressed to the British Government, requesting his immediate release and setting forth the grounds on which the United States objects to his detention. This objection applies equally to his seizure, the responsibility for which rests with the French Government.

For the information of Your Excellency, I am instructed to inform you that the communication to the British Government is in substance as follows: [This portion is left out because it is substantially the same as the note dated at Washington, Mar. 2, 1915. These brackets are mine.]

In communicating to Your Excellency the foregoing substance of the communication to be made to the British Government Your Excellency's attention is especially invited to the rule laid down by one of your distinguished predecessors in a note dated December 3, 1861, addressed to the French Minister at Washington, in which he expressed himself as follows:

[Here follows the quotation from Calvo. Fifth edition, V pp. 94, 95 as given in the note to Ambassador Sharp of Mar. 2, 1915, above.]

Ambassador W. H. Page to the Secretary of State

No. 1166.] AMERICAN EMBASSY,
London, April 6, 1915.

SIR: With reference to your telegram No. 1209 of March 2 last, relative to the detention of August Piepenbrink, I have the honor to inclose herewith a copy of a note I have just received from the Foreign Office, stating that the British and French Governments have decided to liberate this man as a friendly act, while reserving the question of principle involved, upon which my telegram No. 1879 of to-day was based.

I have, etc.,

WALTER HINES PAGE.

(Ibid. p. 359.)

[Inclosure]

The Secretary of State for Foreign Affairs to Ambassador W. H. Page

FOREIGN OFFICE,
April 3, 1915.

YOUR EXCELLENCY: With reference to Your Excellency's note of the 4th instant, relative to the detention of August Piepenbrink, a German subject who was taken prisoner by the French cruiser *Condé* out of the United States Steamship *Windber* and is at present detained at Kingston, Jamaica, I have the honor to inform Your Excellency that His Majesty's Government, in common with the French Government, have decided to liberate this man as a friendly act, while reserving the question of principle involved.

I have, etc.,

For the Secretary of State,
A. LAW.

(Ibid. p. 359.)

The "China" case, 1916.—Another case which gave rise to extended correspondence arose in consequence of the taking of certain persons from the American steamship *China* in 1916. The attitude of the governments is shown in the diplomatic exchanges though the persons taken from the *China* were released by Great Britain.

The Secretary of State to Ambassador W. H. Page

[Telegram—Paraphrase]

DEPARTMENT OF STATE,
Washington, February 23, 1916.

Mr. Lansing informs Mr. Page that the department is advised by American consuls in Hong Kong, Nagasaki, and Shanghai, and by the owners of the American steamship *China*, that on the 18th instant the British cruiser *Laurentic* stopped the *China* on the high seas, about 10 miles from the entrance to the Yangtze-kiang, boarded her with an armed party, and despite the captain's protest, removed from the vessel 28 Germans, 8 Austrians, and 2 Turks, including physicians and merchants, and took them to Hong Kong, where they are detained as prisoners in the military barracks. As it is understood that none of the men taken from the *China* were incorporated in the armed forces of the enemies of Great Britain, the action of the *Laurentic* must be regarded by this Government as an unwarranted invasion of the sovereignty of

American vessels on the high seas. After the notice given to the British Government of this Government's attitude in the *Piepenbrink* case in March, last, which was based upon the principle contended for by Earl Russell in the *Trent* case, this Government is surprised at this exercise of belligerent power on the high seas far removed from the zone of hostile operations. Ambassador Page is directed to present this matter to the Government of Great Britain at once and to insist vigorously that if facts are as reported, orders be given for the immediate release of the persons taken from the *China*. (10 Amer. Jour. Int. Law, Supplement, p. 427.)

Ambassador W. H. Page to the Secretary of State

No. 3259.] AMERICAN EMBASSY,
London, March 17, 1916.

SIR: With reference to the department's telegram No. 2924, of February 23, 1916, protesting against the removal of 38 enemy subjects of Great Britain by the British ship *Laurentic* from the steamship *China* on the high seas off the entrance to the Yangtse River, I have the honor to inclose herewith a copy of a note, dated the 16th instant, from the Foreign Office in reply to the representations I made to Sir Edward Grey in the premises.

I have, etc.,

WALTER HINES PAGE.

[Inclosure]

The British Secretary of State for Foreign Affairs to Ambassador W. H. Page

FOREIGN OFFICE,
March 16, 1916.

YOUR EXCELLENCY: His Majesty's Government have given the most careful consideration to the memorandum which Your Excellency was good enough to communicate to me on the 24th ultimo, conveying a protest from the United States Government against the removal of 38 enemy subjects by His Majesty's ship *Laurentic* from the steamship *China* on the high seas off the entrance to the Yangtze River, and I now have the honor to offer the following observations as an expression of the views of His Majesty's Government in regard to the matter:

The latest attempt to define by common agreement the limits within which a belligerent naval power may remove enemy persons from neutral ships on the high seas is represented by article 47 of the Declaration of London, 1909. This article permitted the

arrest of such persons if "embodied in the armed forces of the enemy," without regard to the destination of the ship on which they were found traveling. The commentary on article 45 of the declaration contained in the report of the drafting committee of the London naval conference states that on practical, not legal, grounds it was agreed that the term "embodied in the armed forces of the enemy" should be considered as not including reservists not yet attached to their military units.

At the beginning of the war His Majesty's Government adhered to articles 45 and 47 of the Declaration of London, as interpreted by the report of the drafting committee. They took this step as a matter of convenience, being at liberty, as the declaration was an unratified instrument, to cancel at any time their adherence, provided always that their subsequent action did not conflict with the general principles of international law. When the German authorities began to remove able-bodied persons of military age from the occupied portions of France and Belgium, His Majesty's Government, as indicated in the circular note which I had the honor to address on November 4, 1914, to the representatives of neutral powers in London, felt that they could no longer accept the restrictive interpretation placed for practical reasons on the terms of article 47 of the Declaration of London by the report of the drafting committee, and that they must arrest all enemy reservists found on board neutral ships on the high seas, no matter where they might be met.

I am aware that the United States Government, after their suggestion early in the war that the belligerent powers should adopt the Declaration of London in its entirety as a code of international naval law, did not find general acceptance, have declared that they no longer consider the declaration as being in force. I have referred at some length to the bearings of the declaration on the position of His Majesty's Government in this question, because article 47 represents the latest, if not the only, attempt to arrive at a definition, by common consent of the chief maritime nations of the law in regard to the matter. The attempt was necessarily conditioned by the experience of previous wars, and the definition was reached after weighing the claims and the convenience of neutral shipping against the importance to belligerent powers, as shown by the experience of previous wars, of preventing enemy subjects from proceeding to their destination and pursuing the hostile purposes for which they were organized.

It is evident, however, from the foregoing observations that the principle (often contended for in the past by certain continental nations) that there are certain classes of persons who are not protected by a neutral flag on the high seas and may therefore

without any invasion of the sovereign rights of the neutral be removed from a neutral ship is now generally admitted. The carriage of such persons may in some cases amount to unneutral service, rendering the ship liable to condemnation; but even when this is not so, the removal of such persons from a neutral ship by a belligerent does not justify any complaint by the neutral state concerned. The question in the present case, is therefore, whether the character and position of the persons removed from the *China* were such as to bring the case within the principle enunciated above.

The present war has shown that the belligerent activity of the enemies of this country is by no means confined to the actual theaters of military and naval operations and that there is no limit to the methods by which Germany in particular seeks to secure a victory for her arms. The hostile efforts of the enemy have shown, and continue to show, themselves on neutral soil in many parts of the world in political intrigues, revolutionary plots, schemes for attacking the sea-borne trade of this country and her allies, endeavors to facilitate the operations of ships engaged in this task, and in criminal enterprises of different kinds directed against the property of neutrals and belligerents alike. War has in effect been extended far beyond the bounds of the area in which opposing armies maneuver, and an unscrupulous belligerent may inflict the deadliest blows on his enemy in regions remote from actual fighting. It may be recalled that a certain Lieut. Robert Fay, of the German Army, was reported in the press last autumn to have been detected experimenting with bombs designed to destroy merchant ships leaving America and operating in the interests of the enemies of Germany. He was said to have admitted that he was sent by the German authorities to the United States expressly for this purpose. His Majesty's Government are not aware what degree of truth there may be in this story, but numerous incidents in America and elsewhere have shown that the facts may be as stated and may be typical.

It is then evidently of the greatest importance for a belligerent power to intercept on the high seas not only mobilized members of the opposing army who may be found traveling on neutral ships, but also those agents whom the enemy sends to injure his opponent abroad or whose services he enjoys without having himself commissioned them. Practical considerations from the belligerents' point of view have changed, and the change necessarily implies a modification in the precise description of enemy subjects whom it is lawful to arrest, supposing such a precise description can be said to have existed in any binding form.

I may add that the action of the United States Government in forwarding requests for safe conducts for agents of states at war with this country whose actions had been such that their continued presence in the United States could no longer be tolerated affords a strong indication that the right to remove certain classes of persons from neutral ships can, in the circumstances of this present war, not be confined to persons embodied in the armed forces of a belligerent.

I may add for the confidential information of the Government of the United States that from actual occurrences and from reliable information received it has been definitely established that the Germans resident in Shanghai have been engaged for some time past in the collection of arms and ammunition, both for clandestine transmission to India and, if possible, for the arming of a ship to play the part of a Far Eastern *Moewe*. His Majesty's Government were able to cope with this activity to a considerable extent and obtained the arrest of various German agents caught in the act of attempting to smuggle arms out of Shanghai; further, the Germans became aware that His Majesty's Government knew of their plots. The commander in chief, China station, received information that owing to this fact the Germans were planning to shift the center of their activity from Shanghai to Manila. Subsequently he was definitely informed that 35 Germans had planned to leave Shanghai in the steamship *China* and proceed to Manila.

His Majesty's ships were sent to patrol off the mouth of the Yangtze with the view of intercepting this party. The date of the *China's* departure was more than once postponed, but she eventually sailed, was intercepted by His Majesty's ship *Laurentic* and found to have on board Germans and Austrians corresponding to those concerning whom information as mentioned above had been received. The *Laurentic* therefore had no hesitation in removing them. The next ostensible port of call of the *China* was Nagasaki, a convenient place at which to transfer to another vessel proceeding to Manila.

It may be added that subsequent information fully confirms that the movement of the body of Germans in question was an integral part of the plot referred to above.

I do not think it will be disputed that persons of this description must be placed within the category of individuals who may, without any infraction of the sovereignty of a neutral State be removed from a neutral vessel on the high seas. The object of their journey was to find another neutral asylum in which they might continue their operations against the interests of this country. The acts which they desire to perform upon the soil of

the United States were such as possibly to compromise the neutrality of that country or to constitute an offense against its criminal laws. They were in effect persons whose past actions and future intentions deprived them of any protection from the neutral flag under which they were sailing.

In Your Excellency's note reference is made to the case of the *Trent*. I venture to hope that the preceding observations show clearly that the present case is of an entirely different nature to that on which the United States Government rely. At the date when the *Trent* case occurred no agreement had been reached as to the claim put forward by certain countries that a belligerent is entitled to remove certain classes of individuals from a neutral ship without bringing the vessel in for adjudication in the prize court; since then, as I have pointed out above, a considerable measure of agreement had been reached on this point. In any case the nature of the persons concerned in the episode of the *Trent* was entirely different from that of the individuals removed from the *China*. Messrs. Slidell and Mason were proceeding to Europe, according to their contention, as the diplomatic representatives of a belligerent; at that time the suggestion that the functions of a diplomatic representative should include the organizing of outrages upon the soil of the neutral country to which he was accredited was unheard of, and the removal of the gentlemen in question could only be justified on the ground that their representative character was sufficient to bring them within the classes of persons whose removal from a neutral vessel was justifiable. The distinction between such persons and German agents whose object is to make use of the shelter of a neutral country in order to foment risings in British territory, to fit out ships for the purpose of preying on British commerce, and to organize outrages in the neutral country itself is obvious.

It is hardly necessary for me to state that it is far from the wish and intention of His Majesty's Government to take any action involving an invasion of the sovereign rights of the United States Government; the above observations will have made it clear that in the view of my Government no such invasion was involved in the action of His Majesty's ship *Laurentic*, and I feel confident that after the foregoing explanations in regard both to the general question involved and to the removal of enemy subjects from the *China* the United States Government will not feel disposed further to contend that this action was not justified.

I have, etc.,

E. GREY.

(Ibid. p. 432.)

Instructions for the Navy of the United States, 1917.—The instructions for the Navy of the United States governing maritime warfare, June, 1917, in article 36 following article 5 of the unratified Declaration of London provide:

A neutral vessel is guilty of indirect unneutral service and may be sent in for adjudication as a neutral vessel liable to condemnation—

(*a*) If she specially undertakes to transport individual passengers who are embodied in the armed forces of the enemy and who are en route for military service of the enemy or to a hostile destination, or transmits intelligence in the interest of the enemy whether by radio or otherwise.

(*b*) If, to the knowledge of the owner, or the charterer, or of the agents thereof, or of the master, she is transporting a military detachment of the enemy, or one or more persons who are embodied in the military or naval service of the enemy and who are en route for military service of the enemy or to a hostile destination, or one or more persons who, during the voyage, lend direct assistance to the enemy, or is transmitting information in the interest of the enemy by radio or otherwise.

In the comment upon article 45 in the general report of the London Naval Conference, 1909, it is stated:

The first case supposes passengers traveling as individuals; the case of a military detachment is considered afterwards. It relates to individuals embodied in the armed military or naval forces of the enemy. There was some doubt as to the meaning of the embodiment which is specified. Does it include those individuals only who, summoned to serve in virtue of the law of their country, have really joined the corps to which they are to belong? Or does it also include such individuals from the time when they are summoned, and before they have joined their corps? The question is of great practical importance. There may be individuals natives of a country of continental Europe and settled in America; these individuals have military obligations toward their native country; they have, for instance, to belong to the reserve of the active army of that country. Their country being at war, they sail to perform their service. Shall they be regarded as embodied in the sense of the provision which we are considering? If the municipal law of certain countries is followed, an affirmative reply would be rendered. But, apart from purely juridical reasons, the contrary opinion has seemed more in accordance with

practical necessity and has been accepted by all in a spirit of conciliation. It would be difficult, or perhaps even impossible, without vexatious measures which neutral governments would not tolerate, to distinguish among the passengers in a vessel those who are bound to perform military service and are on their way to render it. (1909 Naval War College, Int. Law Topics, p 103.)

Case of the "Svithiod," 1920.—On March 28, 1917, the Swedish bark *Svithiod* sailed from Buenos Aires with a cargo of maize consigned to Denmark. The *Svithiod* called at Pernambuco for orders and while there "the master bought and took on board for his own account two bags of rubber, which he did not enter on the manifest, but on the stores list, and where with his connivance a German named Hellman, the third mate of the German merchant ship *Blücher*, then lying interned at Pernambuco, hid himself in the hold with the object of getting to Europe. The *Svithiod* was directed to proceed to Halifax for further orders. She arrived there on July 12, and a search was made in the course of which Hellman and the rubber were discovered." (The *Svithiod*, [1920] A. C. 718.)

The Nova Scotia Admiralty Division of the Exchequer Court of Canada condemned the vessel on the ground of unneutral service in carrying Hellman and the judge said:

> The rubber seized was contraband and carried withoot authority and will be condemned. For carrying the contraband rubber alone I would not have confiscated the ship, but, considering both circumstances, the ship will be forfeited and the rubber confiscated. (10 Lloyd's Prize Cases, p. 1.)

The case was appealed to the judicial committee of the privy council. Lord Sumner for the judicial committee said:

> What this man was, except that he was a mariner and a qualified third officer, the evidence does not show; and even assuming, as probably one may assume, because our eyes can not be closed to circumstances of public notoriety connected with the war, that, if he reached Germany, some service in connection

with the war would promptly have been found for him, the fact remains that he was at the time a seaman in an entirely private capacity, seeking the opportunity of a voyage by which he would at least escape from a further stay at Pernambuco, and proceeding at his own expense, or at the expense of the owners of this Swedish bark, it does not appear which, but without their cognizance at any rate. His case, therefore, can not be placed in the same category at all as the cases where the officers of a belligerent state have engaged a vessel to perform a particular service, or have paid for the carriage of particular passengers, or where persons, already embodied in the service of the belligerent country, are being transported upon some purpose of State.

* * * * *

Their lordships are, of course, very fully impressed with the great importance of the whole topic of unneutral service, particularly in view of the fact that the change in the circumstances under which maritime warfare is now carried on is so great since most of the cases relied upon were decided. On some proper occasion it might be necessary to define with very great accuracy the way in which well-known principles should be applied under modern conditions; but it is precisely because their lordships are so impressed with the importance of the subject, with the high obligations which rest upon neutrals to refrain from all unneutral service, and with the gravity of that breach of duty if it should occur, that they think it unnecessary, and therefore inexpedient and undesirable to endeavor to decide any question of law in a case where, in their view, the captors have failed to lay any foundation in fact which would justify the investigation of so important a subject.

Their lordships will, therefore, humbly advise His Majesty that the appeal succeeds; that the decree of confiscation ought to be set aside, and that the confiscated vessel ought to be restored to her owners. The respondent will pay the costs of the appeal. (Ibid.)

Proposed Rules of Aerial Warfare, 1923. Persons on neutral aircraft.—ART. 37. Members of the crew of a neutral aircraft which has been detained by a belligerent shall be released unconditionally, if they are neutral nationals and not in the service of the enemy. If they are enemy nationals or in the service of the enemy, they may be made prisoners of war.

Passengers are entitled to be released unless they are in the service of the enemy or are enemy nationals fit for military service, in which cases they may be made prisoners of war. * * * (Commission of Jurists to Consider and Report upon the Revision of the Rules of Warfare, Part II, Aerial Warfare, The Hague, 1923.)

Résumé.—While there has been a tendency to extend the scope of unneutral service, it is evident from practice, instructions, decisions, etc., that the principles of the Declaration of London of 1909 were generally accepted at the beginning of the World War in 1914. Where extreme action was taken during the World War on the ground of reprisals such action followed no precedent based on general practice. The transportation of noncombatant persons, who may be noxious or who may by some new relationship into which they may subsequently enter become liable to treatment as combatants, does not involve the vessel carrying such persons in unneutral service or make such persons subject to capture while en route. It is now generally admitted, however, that a belligerent should be permitted to remove enemy combatants from a neutral vessel and that it should not be longer necessary to bring such a vessel to port to render such action lawful. If the early method of maintaining neutral rights should be insisted upon, a great ocean liner might with thousands of innocent passengers be diverted far from its course in order that a single enemy soldier might be removed. The Declaration of London, 1909, provided for the removal from neutral vessels of persons embodied in the armed force of the enemy, and regulations issued subsequent to 1909 generally permitted such removal and sometimes prescribed in detail for the removal. These regulations were similar to some of the treaties in effect in the early nineteenth century.

According to the general report of the Declaration of London only persons "embodied in the armed forces" were liable to be removed, but the national law of a State rather than international law might determine who should be regarded as "embodied." The German Prize Code of 1915 as well as the instructions of the United States Navy of 1917 exempted reservists unless incorporated in the military forces. Perhaps this restriction may

give too much exemption to persons of belligerent nationality on board neutral vessels as has been sometimes argued, but a belligerent may when neutral territory is used as a base for hostile expeditions protest to the neutral against this use. The neutral is naturally reluctant to permit the belligerent to exercise authority within neutral jurisdiction, as would be necessary in the case of taking persons from a neutral vessel and, accordingly, the exercise of such authority has been strictly limited. Otherwise interference would be unduly extended if the determination of the liability of the person rested upon the will of the belligerent.

Nations that have treaties defining the persons that may be removed from neutral ships will follow such treaties. It may be remarked, as has been seen in the quotation from Wheaton (Dana), 1866, hereinbefore cited, that the provisions of these treaties originated more than two centuries ago, before the days of the nation in arms and universal military service, and before there were any reservists as now understood.

Also nations that have regulations on the subject will follow their own regulations, but these regulations are not necessarily based on international law. The accepted law at the outbreak of the World War was, as is shown herein, in agreement with the Declaration of London. The nations that have revised their regulations, during or since the World War, so far as such revisions are now available, as in the case of the Italians and French heretofore cited, authorize the removal of enemy reservists in transit to the enemy's country. The unratified report of the Commission of Jurists, The Hague, 1923, also as has been seen herein takes the same view. The law, however, until custom becomes uniform, can not be changed without international agreement.

In Situation III the present rules in regard to capture do not confer a right to remove from a neutral merchant

vessel, when on a regular voyage, passengers of enemy nationality on the ground that from their age or capacity they may be called for military service. While neutrals may after arriving in a belligerent state enroll in the military service, this does not subject them to interference prior to entering enemy service. Women at the present time are entering upon many of the activities which render them of equal value as belligerents with men and during the World War women performed many services military in nature. It is generally coming to be regarded that women should not on account of sex be entitled to special exemptions when in military service, but it may also be said that they would not suffer exceptional disabilities. States usually maintain that their naturalized citizens on board vessels entitled to fly the national flag shall be treated as any other nationals. To remove any persons from the crew of a merchant vessel may also place the vessel in peril.

Under existing rules and the stated conditions none of the passengers or crew of the *Nemo* should be removed.

SOLUTION

(*a*) The 10 passengers who are citizens of state Y even though of military age and capacity should not be removed from the *Nemo*.

(*b*) The 10 passengers who are trained neutral aviators should not be removed from the *Nemo*.

(*c*) The 5 women passengers who are citizens of state Y though trained aviators should not be removed from the *Nemo*.

(*d*) The 10 members of the crew should not be removed from the *Nemo*.

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